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Supreme Court of the United States

October Term, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General
WARREN SPANNAUS, and its
POLLUTION CONTROL AGENCY,
Appellant,

vs.

MARTIN R. HOFFMAN, Secretary,
DEPARTMENT OF THE ARMY, et al.,
Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO,
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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ON APPEAL FROM, AND PETITION FOR CERTIORARI TO,
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Eighth Circuit Court of Appeals which held that the Federal Water Pollution Control Act Amendments of 1972 [1] do not require the United States Army Corps of Engineers to comply with Minnesota's water quality standards and effluent limitations during

[1] 86 Stat. 816, 33 U.S.C. §1251 *et seq.* (Supp. IV, 1975).

the Corps' dredging operations within Minnesota.[2] In the alternative, Appellant seeks review of the Court of Appeals' judgment by writ of certiorari and respectfully requests this Court to consider this document as a petition for a writ of certiorari.

CITATION TO OPINION BELOW

The opinion of the District Court is reported at 401 F.Supp. 524; the opinion of the Eighth Circuit Court of Appeals at 543 F.2d 1198. The text of these opinions is set forth in Appendix B and C, respectively, pages A-11 to A-45.

JURISDICTION

1. *The Nature of the Proceeding.* Appellant instituted this action in the Third Division of the Federal District Court for the District of Minnesota seeking a declaratory judgment that the Corps of Engineers' dredging activities within the State of Minnesota must be carried out in compliance with State laws and regulations. The complaint is set forth in Appendix A. The proceedings below were instituted pursuant to 28 U.S.C. §2201. Jurisdiction was based on 33 U.S.C. §1365, 28 U.S.C. §1331 and 5 U.S.C. §§701 *et seq.*

2. *The Judgment or Decree Sought to Be Reviewed.* On October 9, 1975, the District Court, on cross-motions for summary judgment, granted Appellant's (Plaintiff-Appellee below) motion and denied Appellees' (Defendants-Appellants

[2] The Court of Appeals also held that the Corps was not required to obtain discharge permits from Minnesota. The permit issue has been settled by this Court in Environmental Protection Agency v. California ex rel State Water Resources Control Board, 426 U.S. 200 (1976). Therefore, Appellant does not appeal from that portion of the Court of Appeals' decision.

below) motion. Notice of Appeal was filed on November 14, 1975. The Eighth Circuit Court of Appeals reversed the District Court and entered judgment for Appellees on October 28, 1976 (Appendix D(1), pages A-45 to A-46). The Notice of Appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on January 4, 1977 (Appendix D(2), pages A-46 to A-47).

3. *The statutory provision which confers jurisdiction on this Court* to review by direct appeal cases in the courts of appeal is 28 U.S.C. §1254(2).[3]

4. *Cases believed to sustain this Court's jurisdiction include: City of Detroit, et al. v. Murray Corporation of America, et al.*, 355 U.S. 489, (1958) reh. den. 357 U.S. 913 (1958).[4]

5. *Statutes and Regulations involved in this appeal.* Supremacy Clause of the United States Constitution, Article VI, Clause 2; Sections 101, 313, 402, 404, 502, 510 and 511 (33 U.S.C. §§1251, 1323, 1342, 1344, 1362, 1370 and 1371) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. §§1251 *et seq.*; Minn. Stat. §§115.01, 115.03 and 115.45; Minn. Regs. WPC 15 and 25. These statutes and regulations are set forth in Appendices E, F and G respectively, pages A-47 to A-117.

[3] If this Court determines that a direct appeal does not lie, Appellant respectfully urges the Court to consider this jurisdictional statement as a petition for certiorari. 28 U.S.C. §2103. In addition, jurisdiction to review by writ of certiorari cases in the courts of appeal is conferred on this Court by 28 U.S.C. §1254(1).

[4] If this Court determines that a direct appeal does not lie, the cases believed to sustain this Court's jurisdiction to review by writ of certiorari include: Environmental Protection Agency v. v. California ex rel State Water Resources Control Board, 426 U.S. 200 (1976); Doran v. Salem Inn. Inc., 422 U.S. 922 (1975); Forna's v. Ridge Tool Co., 400 U.S. 41 (1970); El Paso v. Simmons, 379 U.S. 497 (1965); Leiter Minerals, Inc. v. U.S., 352 U.S. 220, reh. den. 352 U.S. 1019 (1957).

QUESTIONS PRESENTED

The ultimate question presented by this appeal is whether the Federal Water Pollution Control Act Amendments of 1972 (hereafter "FWPCA" or "Act") require the Corps of Engineers to comply during its dredging operations in Minnesota with the State's water quality standards and effluent limitations, Specifically, this appeal raises the issues of:

1. Whether Section 313 of the FWPCA is a clear and unequivocal waiver of federal immunity from state regulation?

2. Whether Section 313 of the FWPCA requires the Corps of Engineers to comply with Minnesota's water quality standards and effluent limitations?

STATEMENT OF THE CASE

1. *The Factual Setting*

The facts in this case are undisputed [5] and are more fully set forth in Appendix A. Briefly, the Corps of Engineers conducts extensive dredging operations within Minnesota. These dredging activities involve removing portions of the bottom sediments of lakes and rivers and depositing the removed sediments into other portions of lakes or rivers or on land. This operation causes the pollutants in the bottom sediment to be redissolved and resuspended in the water. The effect of this dredging on Minnesota's waters is to degrade the water and to produce a habitat that is harmful to the growth, reproduction and survival of water dwelling organisms. These dredging activities result in violations of Minnesota water quality standards and effluent limitations.

[5] At oral argument before the District Court, the parties agreed that there were no issues of material fact. State of Minnesota, Spannaus v. Callaway, 401 F. Supp. 524, 526, n. 1 (D. Minn. 1975).

2. *The Statutory Scheme*

This case involves the Federal Water Pollution Control Act Amendments of 1972[6] (hereafter "FWPCA" or "Act") and the interrelationship of that Act with Minnesota's water pollution statutes and regulations.

a. *The FWPCA*

In 1972, Congress recognized that prior efforts at abating and eliminating water pollution in the United States had been ineffective. After a two year study, the Senate Committee on Public Works concluded that "the national effort to abate and control water pollution has been inadequate in every vital aspect." [7] In response to this problem, Congress enacted the FWPCA. This Act established a comprehensive and complex program designed to attack the various sources and causes of water pollution.

At the outset, Congress established as a national goal the elimination of the discharge of pollutants into the nation's navigable waters by 1985.[8] To attain this goal, the FWPCA established a number of regulatory programs. Thus, the Act includes permit programs for point source [9] discharges,[10] dredged and fill material,[11] and federal aquaculture projects.[12] In addition, there is a federal grants program for the construc-

[6] 86 Stat. 816, 33 U.S.C. §1251 *et seq.* (Supp. IV, 1975).
[7] S. Rep. No. 92-414, p. 7 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1, p. 1425 (1973) (hereafter "Leg. Hist.").
[8] Section 101(a)(1), 33 U.S.C. §1251(a)(1) (Supp. IV, 1975).
[9] Point sources are defined by section 502(14), 33 U.S.C. §1362(14) (Supp. IV, 1975) as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."
[10] Section 402, 33 U.S.C. §1342 (Supp. IV, 1975).
[11] Section 404, 33 U.S.C. §1344 (Supp. IV, 1975).
[12] Section 318, 33 U.S.C. §1328 (Supp. IV, 1975).

tion of waste treatment works,[13] and a planning program for the control of non-point source water pollution.[14] Further, the Act adopted effluent limitations [15] as the primary water pollution control standard. However, the system of water quality standards that had been established for interstate waters under the prior act were expressly continued in force.[16] The Act provides that all "discharges of pollutants" are unlawful,[17] unless the discharge is in compliance with appropriate effluent limitations,[18] water quality related effluent limitations,[19] national standards of performance for new sources,[20] effluent standards for toxic pollutants,[21] federal aquaculture permits,[22] and federal or state NPDES permits.[23]

In essence, the FWPCA rejects the view that there is social utility in using the nation's waters as a waste disposal and treatment system.[24] The Act requires treatment of those wastes prior to entry into the water and mandates that water pollution must be eliminated to the fullest extent that technology will permit.

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[13] Sections 201 through 207, 33 U.S.C. §§1281 through 1287 (Supp. IV, 1975).
[14] Section 208, 33 U.S.C. §1288 (Supp. IV, 1975).
[15] Section 502(11), 33 U.S.C. §1362(11) defines "effluent limitations" as restrictions on "quantities, rates and concentrations of chemical, physical, biological and other constituents" of discharges from point sources.
[16] Section 303(a)(1), 33 U.S.C. §1313(a)(1) (Supp. IV, 1975).
[17] Section 301(a), 33 U.S.C. §1311(a) (Supp. IV, 1975).
[18] Section 301(b), 33 U.S.C. §1311(b) (Supp. IV, 1975).
[19] Section 302, 33 U.S.C. §1312 (Supp. IV, 1975).
[20] Section 306, 33 U.S.C. §1316 (Supp. IV, 1975).
[21] Section 307, 33 U.S.C. §1317 (Supp. IV, 1975).
[22] Section 318, 33 U.S.C. §1328 (Supp. IV, 1975).
[23] Section 402, 33 U.S.C. §1342 (Supp. IV, 1975).
[24] 2 Leg. Hist. at 1274.

b. *Minnesota Law*

Minnesota has vigorously carried out its responsibilities and duties under the FWPCA. The State has adopted a comprehensive set of water pollution laws.[25] These include administration of the NPDES permit program and the Federal construction grants program. In addition, the state has its own state permit program[26] for the operation and construction of disposal systems and a state construction grants program to supplement the federal grants.[27] In essence, the State has an effective program for the regulation and control of water pollution.

The principal State laws at issue in this case are Minn. Stat. §115.45 (1974) and Minn. Reg. WPC 15. Minn. Stat. §115.45 imposes a duty upon every person to comply with "all regulations, . . . and to do and perform all acts and things within his or its power required to effectuate, carry out and accomplish the purposes of such provisions, regulations . . . ." Person is defined by Minnesota law[28] to include "any governmental subdivision."

Minn. Reg. WPC 15, a regulation duly adopted by the Minnesota Pollution Control Agency,[29] contains both water quality standards and effluent limitations, which, Appellant contends, apply to the Corps of Engineers' dredging operations in Minnesota.[30] This regulation has been approved by EPA

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[25] Minn. Stat. ch. 115 and 116 *et seq.*; Minn. Regs. WPC 1 through 32, 34, 36 and 37.
[26] Minn. Stat. §115.07 (1974), Minn. Reg. WPC 36.
[27] Minn. Reg. WPC 34.
[28] Minn. Stat. §115.03 subd. 10 (1974).
[29] Minn. Reg. WPC 15 is set forth in Appendix G (4), pages A-76 to A-108.
[30] Minn. Regs. WPC 2, 3, 6, 18, 28 and 29 also apply to lakes and rivers dredged by the Corps.

as conforming to the requirements of §303 of the FWPCA.[31] Minn. Reg. WPC 15(c)(2) prohibits the discharge of sewage, industrial wastes or other wastes[32] into any interstate waters of the State ". . . so as to cause any nuisance conditions, such as significant amounts of floating solids, . . . excessive suspended solids, material discoloration, . . . or other offensive or harmful effects."

3. *The Proceedings Below*

On April 17, 1975, Minnesota brought an action for a declaratory judgment against the United States Army Corps of Engineers and Howard H. Callaway,[33] Secretary of the Army; Lieutenant General William C. Gribble, Chief of Engineers; and Colonel Max Noah, District Engineer, both individually and in their official capacities. The suit sought a determination that the FWPCA requires the Corps' dredging operations within Minnesota be carried out in compliance with state laws and regulations.

The Corps moved to dismiss on July 11, 1975, alleging that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. At oral argument, the parties agreed that there were no issues of material fact and that the case should be considered as if submitted on cross motions for summary judgment.

[31] 40 C.F.R. §120.10 (1976); letter dated November 6, 1973, from Francis Mayo, Regional Administrator, Region V, U.S. EPA to Governor Wendell Anderson, Minnesota.
[32] Minn. Stat. §115.01 subd. 4 (1974) defines "other waste' as specifically including dredge spoil.
[33] During these proceedings, Martin R. Hoffman succeeded Howard H. Callaway as Secretary of the Army.

On October 9, 1975, the District Court granted Minnesota's motion for summary judgment and denied the Corps' motion. The Corps filed its Notice of Appeal to the Eighth Circuit Court of Appeals on November 14, 1975.

The Court of Appeals, on October 26, 1976, reversed the District Court and held that the FWPCA does not require the Corps to obtain a discharge permit from Minnesota for its dredging operations or to comply with Minnesota's water pollution statutes and regulations during the Corps' dredging activities. Minnesota filed its Notice of Appeal to this Court on January 4, 1977.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This case presents this Court with the opportunity to define fully the proper relationship between the federal government and the states with respect to state environmental law. The Court began this task in *Hancock v. Train*[34] and *EPA v. California ex rel. State Water Resources Control Board*[35] when it addressed the issue of federal compliance with state permitting procedures. This appeal raises the remaining important issue that is essential to a complete understanding of federal-state relationships in the field of pollution control; federal compliance with substantive state environmental standards. As this Court recognized in *Hancock* and *California*, the issue of federal compliance with state law is important and presents substantial questions.

The states historically have had a substantial interest in regulating and protecting their own waters. *Askew v. Ameri-*

[34] 426 U.S. 167 (1976).
[35] 426 U.S. 200 (1976).

can Waterways Operators, Inc., 411 U.S. 325 (1973).[36] Congress, when it enacted the FWPCA, recognized that the states were primarily responsible for regulating water pollution and clearly and unequivocally preserved the states' authority to adopt and enforce water pollution standards. Further, this Court's opinions in *Hancock*[37] and *California*[38] support the conclusion that federal entities must comply with substantive state pollution requirements.

The Court of Appeals, however, in reversing the District Court, applied the rationale of *Hancock* and *California* not only to state pollution permitting requirements but also to state substantive water pollution control standards. This conclusion is contrary to the FWPCA's express language, the Act's legislative history, and the *Hancock* and *California* decisions.

Therefore, the questions presented by this appeal are important to the states not only because of their traditional role of protecting their own waters but also because this Court will authoritatively resolve the substantial question of the federal government's compliance with the states' substantive water pollution control statutes and regulations.

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[36] *See also* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), involving air pollution.
[37] 426 U.S. 167 (1976).
[38] 426 U.S. 200 (1976).

1. Section 313 of the FWPCA is a Clear and Unambiguous Waiver of Federal Immunity from State Regulation Which Requires Federal Entities to Comply with State Water Quality Standards

Section 313[39] of the FWPCA expressly directs the federal government to comply with state standards. Although the usual rule, based on the Supremacy Clause of the United States Constitution,[40] is that the federal government is immune from state regulation,[41] it is clear that Congress may waive this immunity and allow the state regulation of federal instrumentalities. *Mayo v. United States*, 319 U.S. 441 (1943); *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943). This waiver is found when Congress by specific action or a clear mandate authorizes state regulation. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).

Section 313 is the only provision in the FWPCA that addresses the relationship between the federal government and the states regarding compliance with water pollution control requirements. This section is a clear and unambiguous waiver of federal immunity and expressly mandates all federal entities to comply with state requirements respecting the control and abatement of pollution. The language of the section is explicit and mandatory:

> Each department, agency or instrumentality of the executive, legislative and judicial branches of the *federal government . . . shall comply with federal, state,* interstate, and local requirements respecting control and abatement of pollution . . . .

(Emphasis added.)

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[39] 33 U.S.C. §1323 (Supp. IV, 1975).
[40] Article VI, Clause 2.
[41] Hancock v. Train, *supra*, at 179; EPA v. California, *supra*, at 211.

There is no doubt that the Corps of Engineers is an instrumentality of the federal government. Consequently, section 313 directs the Corps to comply with state requirements respecting control and abatement of pollution.[42] As the District Court stated, §313 is an "unqualified order to comply."[43]

Despite the clear language of §313, the Court of Appeals concluded ". . . that there was insufficient evidence for finding Congressional authorization for state regulation . . ." of the Corps' dredging activities.[44] In reaching this conclusion, the Court of Appeals relied upon section 404[45] of the Act and this Court's opinions in *Hancock* and *California*. This reliance is misplaced.

Section 404 is silent with respect to the Corps' obligations to comply with the State's water quality and effluent standards. There is absolutely no indication in that section that the Corps or anyone else is immune from state regulation. Section 404 merely establishes a permit program for the disposal of dredged and fill material.[46] Thus, the Court of Appeals' conclusion that section 404 precludes compliance with state stan-

[42] The Corps' own regulation for the administration of the §404 permit program provides that federal dischargers must comply with state standards. 33 C.F.R. §209.120(e)(4)(ii) (1976). While the Corps procedurally processes its own projects under 33 C.F.R. §209.145 (1974), that regulation cites §313 of the Act as applicable to the Corps. 33 C.F.R. §209.145(b) (1974).

[43] State of Minnesota, Spannaus v. Callaway, *supra*, at 530.

[44] State of Minnesota by Spannaus v. Hoffman, *supra*, at 1209.

[45] 33 U.S.C. §1344 (Supp. IV, 1975).

[46] When Congress intended federal dischargers not to comply with state requirements, they expressly exempted the federal government. Thus, section 306(c), 33 U.S.C. §1316(c), which authorizes states to develop a procedure for applying and enforcing new source performance standards, expressly exempts federal dischargers. Similarly section 308(c), 33 U.S.C. §1318(c), which permits the states to develop procedures for the inspection, monitoring and entry onto a discharger's premises, also exempts the federal government. It is obvious that Congress knew how to exempt federal facilities from state regulation. If Congress had intended the Corps not to comply with state water quality standards and effluent limitations, they would have expressly provided for such an exemption in the Act.

dards is erroneous and contrary to the express language of both section 313 and section 404.

Further, the Court of Appeals has misunderstood the legal significance of the *Hancock* and *California* decisions. Those cases involved whether federal instrumentalities were required to comply with state permitting requirements; essentially whether the federal government was required to follow state procedural requirements. The Court of Appeals relied on those cases in reaching its conclusion that the federal government is not required to comply with either state procedural or substantive requirements. This conclusion is not sustainable by the language in those cases. In *Hancock*, this Court observed "[t]he parties *rightly* agree that §118[47] obligates federal installations to conform to state air pollution standards or limitations. . . ."[48] (Emphasis added.) Similarly, in *California* the Court quoted with approval the conclusion of the lower court that "'. . . the legislative history of Section 313 refers simply and solely to substantive' standards . . . ."[49] Thus, it is clear that Congress in section 313 waived federal immunity from state regulation and ordered all federal entities to comply with all water pollution standards—federal, state and local. The Court of Appeals erred in not so holding.

Finally, the effect of the Court of Appeals' decision is to read into §313 an exemption for the Corps where none exists. This results in rendering that section a nullity as applied to the Corps. It is illogical to conclude that Congress explicitly directed all federal instrumentalities to comply with state pollution standards but implicitly intended to exclude the Corps,

[47] Section 118 of the Clean Air Act is virtually identical to §313. EPA v. California, *supra*, at 212.

[48] Hancock v. Train, *supra*, at 181.

[49] EPA v. California, *supra*, at 215.

a major federal discharger. The inescapable conclusion is that section 313 requires the Corps to comply with State water quality standards and effluent limitations during its dredging operations.

2. Compliance With State Standards by the Corps is Consistent With the Expressed Policy of the Act and Essential to Achieving the Act's Objective

Congress declared in §101(b) of the FWPCA that national policy was "to recognize, preserve and protect the primary responsibility of the states to prevent, reduce, and eliminate pollution." [50] This declaration recognizes the traditional interest of the states in protecting their own waters. Further, Congress established as a national goal the elimination of the discharge of pollutants into the nation's navigable waters by 1985.[51] Finally, section 510 of the Act[52] expressly preserves the states' authority to adopt or enforce any standard or limitation, including more stringent ones, respecting discharges of water pollutants. Congress was obviously aware that state regulation had to be an integral part of any national pollution control program. Thus, Congress ensured that state authority in this area was not diminished. In fact, as this Court observed in *California*, section 510 was intended to strengthen state authority.[53]

In addition, the state standards which federal instrumentalities must comply with are federally approved standards. Section 303 of the Act [54] requires the states to develop and adopt water quality standards that are satisfactory to the

[50] 33 U.S.C. §1251(b) (Supp. IV, 1975).
[51] Section 101(a)(1), 33 U.S.C. §1251(a)(1) (Supp. IV, 1975).
[52] 33 U.S.C. §1370 (Supp. IV, 1975).
[53] EPA v. California, *supra*, at 218.
[54] 33 U.S.C. §1312 (Supp. IV, 1975).

United States Environmental Protection Agency (EPA). Thus, this case does not present the situation where the states are attempting to force the federal government to comply with unreasonable local restrictions. To the contrary, Appellant seeks compliance with standards that have been approved by a major federal agency.[55]

The Court of Appeals' holding is contrary to this express Congressional policy and effectively undermines the national goal of eliminating the discharge of pollutants into the nation's waters by 1985. Compliance by all sources—federal, state and local—with the states' water quality and effluent standards is an essential step in achieving this "no-discharge goal." It is absurd to conclude that Congress charged the states with the primary responsibility for achieving the national "no-discharge" goal but precluded them from requiring federal dischargers, a major source of pollution, to comply with the states' substantive water pollution control standards, the critical means for meeting that goal.

3. Compliance With State Standards as Mandated by the FWPCA Will Not Interfere with the Corps' Responsibility to Maintain Navigation

Appellant recognizes that the Corps has an obligation to maintain navigation. The FWPCA acknowledges that duty.[56] However, compliance with state water pollution standards only requires the Corps to discharge their duties in an en-

[55] If a state fails to adopt water quality standards, section 303 requires the Administrator of EPA to promulgate the water quality standards for the state. Thus, if Minnesota had not adopted standards for her waters, the Administrator of EPA would have been required to do so by the FWPCA. The Corps could not have objected to compliance with EPA standards on the basis of the alleged federal immunity.
[56] Section 511, 33 U.S.C. §1371 (Supp. IV, 1975).

vironmentally sound manner. This compliance is necessary if the national goal of eliminating the discharge of pollutants[57] into navigable waters by 1985 is to be achieved.

Congress recognized the possibility that compliance by federal agencies, such as the Corps, with state standards might severely affect the activities of the federal government. Consequently, Congress expressly provided that an exemption from state pollution control requirements may be granted by the President when he determines that an exemption would be in the "paramount interest of the United States."[58] Therefore, if the Corps found that compliance with Minnesota's standards adversely impacted the Corps' duty to maintain navigation, they could apply for a Presidential exemption. The Corps has not sought a Presidential exemption from the requirements of section 313 and none has been granted. In fact, to the contrary, the President has directed federal agencies to ensure that their facilities conform to "Federal, State, interstate and local water quality standards and effluent limitations . . . ."[59]

Therefore, the Court of Appeals' concern that the Corps' compliance with state standards would interfere with its duty to maintain navigation is unfounded. The FWPCA creates a method for exempting compliance on a case-by-case basis if circumstances warrant it. The Corps should be required to follow those procedures. As the District Court observed, compelling the Corps to comply with state requirements ". . .

[57] Since "dredged spoil" is specifically defined by §502(6), 33 U.S.C. §1362(6) (Supp. IV, 1975), as a "pollutant," the dredging activities of the Corps result in a discharge of pollutants to the navigable waters of the United States.

[58] Section 313, 33 U.S.C. §1323 (Supp. IV, 1975).

[59] Exec. Order No. 11752, 3 C.F.R. ch. IV, p. 380 (1974).

would merely require . . . the Corps . . . to accomplish [its] mission in compliance with effluent limitations established pursuant to the Act."[60]

CONCLUSION

For the reasons set forth, the Court should note probable jurisdiction, or grant certiorari, and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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[60] State of Minnesota, Spannaus v. Callaway, *supra*, at 531.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General
WARREN SPANNAUS, and its
POLLUTION CONTROL AGENCY,
Appellant,

vs.

MARTIN R. HOFFMAN, Secretary,
DEPARTMENT OF THE ARMY, et al.,
Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO,
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

STATE OF MINNESOTA, by its Attorney General, WARREN SPANNAUS, and its Pollution Control Agency,
Plaintiff,

vs.

Howard H. Callaway, Secretary
Department of the Army;
Corps of Engineers
Department of the Army;
Lt. Gen. William C. Gribble
Chief of Engineers
Department of the Army; and
Colonel Max Noah
District Engineer
Corps of Engineers,
Defendants.

COMPLAINT

The State of Minnesota, by its Attorney General, Warren Spannaus, at the request of the Minnesota Pollution Control Agency, for its complaint herein states and alleges as follows:

INTRODUCTION

1. This is an action for a declaratory judgment, commenced pursuant to 28 U.S.C.A. §2201 (1959) to determine that Defendants, during the course of dredging activities in the State of Minnesota, are required to comply with Minnesota

Statutes and Regulations which relate to maintenance of the quality of the water in the lakes and rivers of Minnesota. At present Defendants dredge major Minnesota waterways on a seasonal basis for the purpose of maintaining commercial channels. The manner of the dredging results in violations of Minnesota Statutes and Regulations and in severe degradation of the quality of the waters of this state.

JURISDICTION AND VENUE

2. This action arises under the laws of the United States, *inter alia*, 33 U.S.C.A. §1251 et seq. (Supp. 1975) and 33 U.S.C.A. §1365 (Supp. 1975). This court has jurisdiction pursuant to 33 U.S.C.A. §1365 (Supp. 1975); 28 U.S.C.A. §1331 (1966); and 5 U.S.C.A. §701 et seq. (1967). The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

3. This Court is the proper venue of this action pursuant to 28 U.S.C.A. §1391 (Supp. 1975) since three of the defendants are officials of the United States acting in their official capacities and the other defendant is an agency of the United States, the cause of action arose in the District of Minnesota, the cause of action involves real property located within the District of Minnesota, and Plaintiff resides within that District.

DESCRIPTION OF PARTIES

4. Warren Spannaus is the Attorney General of the State of Minnesota and is generally charged with enforcement of all laws of this state (Minn. Stat. §8.01 et seq. (1974)), and is specifically charged with enforcement of the statutes and regulations relating to air, land and water pollution (Minn. Stat. §115.071 subd. 3 and 4 (1974)). The Minnesota Pollution Control Agency (hereinafter "Agency") is a statutory agency of the State of Minnesota. It is responsible for administering and enforcing laws and regulations relating to air, land and water pollution, which laws and regulations have general application throughout the State of Minnesota (Minn. Stat. §115.01 et seq. and §116.01 et seq. (1974)).

5. Defendant Howard H. Callaway is Secretary of the Army and is the head of the Department of the Army.

6. Defendant Corps of Engineers, hereinafter referred to as the Corps, is one of the basic branches of the Army authorized by 10 U.S.C.A. §3063 (1959). The Corps engages, *inter alia*, in dredging in the waters of the United States and has its principle place of business in Washington, D.C.

7. Defendant Lt. Gen. William C. Gribble is the Chief of Engineers, Department of the Army, and is vested with authority over the operations of the Corps.

8. Defendant Colonel Max Noah is the Chief Engineer of the St. Paul District of the Corps vested with authority over the Corps in the St. Paul District.

FACTUAL ALLEGATIONS

9. The Defendants in the course of performing their duties within the State of Minnesota dredge, and maintain by dredging, channels and harbors in the waters of Minnesota for the purpose of aiding commercial navigation.

10. The entire State of Minnesota is within the St. Paul District of the Corps.

11. Among the major dredging projects the Corps undertakes within the State of Minnesota are the maintenance by dredging of a navigation channel in the Mississippi River, various harbors on Lake Superior, and a harbor on Lake of the Woods at Warroad, Minnesota. The Corps also engages in other dredging maintenance and from time to time in dredging related to construction.

12. The exact extent of defendant's dredging activities in the State of Minnesota are unknown to the Plaintiff. Upon information and belief part of defendant's dredging activities in the State of Minnesota consist of the annual removal of approximately two million cubic yards of bottom sediments from the Mississippi River and depositing approximately one million cubic yards of dredge spoil in Minnesota.

13. Each dredging activity is carried out in the waters of Minnesota by removing portions of the bottom sediments of lakes and rivers and depositing the removed sediments into other portions of lakes and rivers or on land.

14. During the loosening of bottom sediments the dredging activity disrupts the bottom of the lake or stream causing pollutants which were adsorbed to bottom sediments and pollutants which had precipitated into the bottom sediments to be redissolved and resuspended.

15. During the removal of the bottom sediments, portions of the dredge spoil are washed into the water causing pollutants to be redissolved and resuspended in the water and causing turbidity in the water.

16. The resuspension and redissolution of pollutants and turbidity caused by the loosening and removal processes degrade the quality of the water of the lake or river to an extent which affects the habitat and the organisms which are present in the lake or river including fish, shellfish and wildlife.

17. Once the bottom sediments are excavated from the river or lake, the dredge spoil is disposed of (or "spoiled") by dumping onto land at unconfined sites or redeposited into open water portions of the water body. The exact method of disposal is dependent on the method of dredging and the location of the dredging.

18. The effect of Defendant's dredging operations including removal and disposal is to seriously harm the quality of the water in Minnesota by greatly increasing the amounts of suspended and dissolved solids, creating turbidity and resuspending and dissolving the pollutants which had lay dormant or were adsorbed to sediments on the bottom of the waters. This deterioration of the quality of the water in the river adversely affects the ability of a variety of organisms to grow, reproduce and survive in waters affected by the dredging activity.

STATUTORY BACKGROUND

19. 33 U.S.C.A. §1323 (Supp. 1975) provides in pertinent part as follows:

> Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. . . .

20. 33 U.S.C.A. §1311 (Section 301 of the Federal Water Pollution Control Act Amendments of 1972) provides in pertinent part:

> (a) Except as in compliance with this section and sections 1317, 1328, 1342, and 1344, of this Title, the discharge of any pollutant by any person shall be unlawful.
>
> (b) In order to carry out the objective of this chapter there shall be achieved—
>
> . . .

[N]ot later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this Title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to Chapter.

. . .

21. The dredging activities and depositing of dredge spoil materials and future similar operations of Defendants are within the provisions of 33 U.S.C.A. §1311 (Supp. 1975) and 33 U.S.C.A. §1323 (Supp. 1975).

22. 33 U.S.C.A. §1323 and §1311 (Supp. 1975) each make Defendants' dredging activities subject to Minnesota effluent and water quality standards.

COUNT I

23. Plaintiff realleges the allegations contained in paragraphs 1 through 22 of this complaint.

24. Minn. Reg. WPC 15(c)(3) provides in part:

Existing discharges of inadequately treated sewage, industrial waste or other wastes shall be abated, treated or controlled so as to comply with the applicable standards.

25. "Other wastes" are defined by Minn. Stat. §115.01 subd. 4 as:

"Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, oil, tar, chemicals, dredged spoil, solid waste, incinerator residue, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, cellar dirt or municipal

or agricultural waste, and all other substances not included within the definitions of sewage and industrial waste set forth in this chapter which may pollute or tend to pollute the waters of the state.

26. Minn. Reg. WPC 15(c)(6) establishes the following effluent standard:

[T]he Agency shall require secondary treatment as a minimum for all municipal sewage and biodegradable industrial or other wastes to meet adopted water quality standards. . . . Secondary treatment facilities are defined as works which will provide effective sedimentation, biochemical oxidation, and disinfection, or the equivalent, including effluents conforming to the following:

Substance or Characteristic	*Limiting Concentration Range*
5-day biochemical oxygen demand	25 milligrams per liter
Fecal coliform group organisms	200 most probable number per 100 milliliters
Total suspended solids	30 milligrams per liter
. . .	
Oil	Essentially free of visible oil
. . .	
Turbidity	25
ph range	6.5-8.5
Unspecified toxic or corrosive substances	None at levels acutely toxic to humans or other animals or plant life or directly damaging to real property

27. These regulations have the force and effect of law and are fully applicable to and enforceable against the Defendants and others.

28. During the course of their dredging operations on the Mississippi River and elsewhere, the Defendants have failed and will continue to fail to treat or control their discharges of other wastes to comply with State effluent standards in violation of Minn. Reg. WPC 15(c)(3) and Minn. Reg. WPC 15(c)(6).

COUNT II

29. Plaintiff realleges the allegations contained in paragraphs 1 through 22 of this Complaint.

30. Minn. Reg. WPC 15(c)(13) provides in part:

> No sewage, industrial waste or other wastes shall be discharged into the interstate waters of the state in such quantity or in such manner alone or in combination with any substances as to cause pollution thereof as defined by law. . . .

31. With respect to the dredging activities of the Corps Minn. Reg. WPC 15(d) provides in part:

> The following standards shall prescribe the qualities or properties of the interstate waters of the state which are necessary for the designated public use or benefit and which, if the limiting conditions given are exceeded, shall be considered indicative of a polluted condition which is actually or potentally deleterious, harmful, detrimental or injurious with respect to such designated uses or established classes of the interstate waters. . . .

32. These regulations have the force and effect of law and are fully applicable to and enforceable against the Defendants and others.

33. Minn. Reg. WPC 15(d) also establishes water quality standards for each of the waters in which Defendants carry on dredging activities. During the course of their dredging operations, the Defendants discharge and will continue to discharge dredge spoil to the waters of Minnesota in such quantities and in such a manner as to cause pollution as defined by these water quality standards. The result of such dredging activity is in violation of Minn. Reg. WPC 15 (c) (13) and Minn. Reg. WPC 15(d).

COUNT III

34. Plaintiff realleges the allegations contained in paragraphs 1 through 22 of this Complaint.

35. Minn. Stat. § 115.07 subd. 1 (1974) provides:

> It shall be unlawful for any person to construct, install or operate a disposal system, or any part thereof, until plans therefor shall have been submitted to the [Agency] unless the [Agency] shall have waived the submission thereof to it and a written permit therefor shall have been granted by the [Agency].

36. Minn. Reg. WPC 36(e)(6)(aa) provides in part:

> No person shall construct, install or operate a disposal system, or any part thereof, until an application for a state disposal system permit and plans and specifications therefor have been submitted to the Director [of the Agency], and a permit for such disposal system has been issued by the Director and approved by the Agency.

This regulation has the force and effect of law and is fully applicable to and enforceable against the Defendant and others.

37. Minn. Stat. §115.01 subd. 8 (1974) defines "disposal system" as:

[A] system for disposing of sewage, industrial waste, and other wastes, and includes sewer systems and treatment works.

38. Defendant has operated and is operating a disposal system without obtaining a state disposal system permit, in violation of Minn. Stat. §115.07 subd. 1 (1974) and Minn. Reg. WPC 36(e)(6)(aa).

39. Plaintiff has met with Defendants and their representatives on numerous occasions in an attempt to achieve voluntary compliance with Minnesota Statutes and Regulations. Defendants and their representatives have consistently claimed that they are not subject to Minnesota Statutes and Regulations and have not taken actions to come into compliance with Minnesota law. Plaintiff believes or has reason to believe that such claim and refusal to act will continue in the future.

RELIEF REQUESTED

WHEREFORE, plaintiff prays that the Court enter its order and judgment as follows:

1. Declaring that applicable federal law requires the dredging activity of Defendants to be carried out within the ambit of state laws and regulations.

2. Declaring that the dredging activities carried out by Defendants within the State of Minnesota must be conducted in accordance with Minnesota Statutes and Regulations regarding water quality including but not limited to Minn. Reg. WPC 15 (c)(3); Minn. Reg. WPC 15 (c)(6); Minn. Reg. WPC 15 (c)(13); Minn. Reg. 15(d); Minn. Reg. WPC 36(e)(6)(aa) and Minn. Stat. §115.07 (1974).

3. Granting any further relief which may be just and appropriate including reasonable attorneys fees.

Respectfully submitted,

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Dated: April 17, 1975.

APPENDIX B

(Caption)

MEMORANDUM & ORDER

Warren Spannaus, Attorney General, Eldon G. Kaul, Assistant Attorney General and William P. Donohue, Special Attorney General, St. Paul, Minnesota, attorneys for plaintiff.

Robert G. Renner, United States Attorney, Stephen G. Palmer, Assistant United States Attorney, Minneapolis, Minnesota and Michael O. Graves, Department of Justice, Washington, D.C., attorneys for defendants.

In this declaratory judgment action brought by the State of Minnesota against certain federal officials, the issue is

whether the U. S. Corps of Engineers must comply with Minnesota laws and regulations governing pollution abatement in its dredging operations on the Mississippi River and elsewhere. We hold it must.

The matter is before the court on defendants' motion to dismiss under Rule 12 based on their allegations that the court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief can be granted. Because there are no issues of material fact, this matter is considered submitted on cross motions for summary judgment.[1]

In this lawsuit, plaintiff, the State of Minnesota by its attorney general and its Pollution Control Agency, seeks a declaration that the Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1251 *et seq.*, require defendants, the Secretary of the Army, the Corps of Engineers and two of its officers, to carry out their dredging activities in compliance with Minnesota pollution abatement laws and regulations. In its three count complaint, plaintiff contends that defendants are in violation of Minnesota pollution laws and regulations which require secondary treatment of all dredged spoil, forbid discharges into navigable waters which violate state water quality standards and require all dredgers obtain a disposal permit from the Pollution Control Agency. Plaintiff alleges that the dredging activities of defendants seriously harm the quality of navigable waters within Minnesota by resuspending and redissolving previously adsorbed or dormant pollutants causing turbidity and degrading the habitat of fish, plants and other water organisms.

[1] At oral argument held on August 18, 1975, the parties agreed that there are no issues of material fact, that the case is indeed ripe for final determination and that it should be considered as if submitted on cross motions for summary judgment.

Jurisdiction

The first question presented for decision is whether the general federal question statute, 28 U.S.C.A. § 1331, gives the court jurisdiction to enforce the Water Pollution Control Act. Defendants argue that 33 U.S.C.A. § 1365, which provides that "[t]he district courts shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties, to enforce . . . an effluent standard or limitation . . . and to apply any appropriate civil penalties under section 1319(d) of this title," is the exclusive jurisdictional basis to raise questions under the Act. Section 1365(b) provides that "[n]o action may be commenced—under . . . this section—

> (A) prior to sixty days after the plaintiff has given notice of the alleged violation . . . (iii) to any alleged violator. . . ."

Because plaintiff has not complied with this notice provision, defendants argue that this suit must be dismissed for want of subject matter jurisdiction. For the reasons that follow, the court accepts plaintiff's contention that it has jurisdiction under the general federal question statute to hear claims arising under the Water Pollution Control Act.[2]

First, § 1365(e) states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." This "saving clause," consistent with the legislative

[2] Plaintiff also maintains that section 10(a) of the Administrative Procedure Act, 5 U.S.C.A. § 702, provides jurisdiction. The case law in this circuit is that the Administrative Procedure Act does not furnish an independent basis of jurisdiction. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967).

history of § 1365, evinces a clear congressional intent to expand, rather than restrict federal jurisdiction.

Defendants direct the court's attention to *Natural Resources Defense Council, Inc. v. Callaway*, 389 F. Supp. 1263 (D. Conn. 1974), where the court decided that "alleged violations of the Water Pollution Control Act may not be complained of under some other jurisdictional head (*e.g.* 28 U.S.C. § 1331 (1970)" despite subsection (e). *Id.* at 1271, n. 28. This subsection, the court decided, "was not intended to allow violations of the Act to be prosecuted, except as they create some rights independent of the Act, other than under the jurisdictional grant of the Act, 33 U.S.C. § 1365 (Supp. II, 1972)." *Id.* However, the Court of Appeals for the District of Columbia Circuit, in an enlightening and well reasoned opinion, concluded that actions to enforce the Act may be brought under § 1331.[3] *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 699 (D.C. Cir. 1975).

In that case, plaintiff did not give the sixty days notice required by § 1365 and defendant urged the court to dismiss for lack of subject matter jurisdiction arguing that any lawsuit to enforce the Act must be commenced under § 1365. In reaching its decision, the court relied on the legislative history of § 1365 and also on the legislative history of section 304 of the Clean Air Act Amendments of 1970. Congress used this provision of the Clean Air Act as the model for § 1365. 1972 U.S. Code, Cong. & Admin. News p. 3745. The legislative history of section 304 clearly indicates that it was intended to broaden

[3] The Court of Appeals also decided that section 10(a) of the Administrative Procedure Act, 5 U.S.C.A. § 702, would furnish jurisdiction. However, the law in that circuit is that section 10(a) is an independent source of jurisdiction. *Pickus v. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

rather than restrict federal jurisdiction. That section "took broad steps to facilitate the citizen's role in the enforcement of the Act, both in renouncing those concepts that make federal jurisdiction dependent on diversity of citizenship and jurisdictional amount, and in removing the barrier, or hinderance, to citizen suits that might be threatened by challenges to plaintiff's standing." *Natural Resources Defense Council, Inc. v. Train, supra.*, at 700. The court determined that, in light of its legislative history, section 304 "reflected a deliberate choice by Congress to widen citizen access to the courts. . . ." *Id.* A congressional report on this section stated that "[t]he right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected." *Id.* at 701, n. 45. The sixty days notice provision is one of several jurisdictional restrictions contained in § 1365. However, these "restrict the expansion of jurisdiction provided by the special citizen suits provision of § 1365 and do not cut back on federal court jurisdiction over actions that would have been maintainable even in the absence of that special authorization. This intent is confirmed by the saving clause of subsection (e)." *Id.* at 702, footnote omitted.

Clearly, an action for a declaration that the Act applies to these defendants is one arising under the laws of the United States. However, to properly invoke the jurisdiction granted by § 1331, not only must the action arise under the laws of the United States but there must be more than $10,000 in controversy. The Supreme Court has recently indicated that this jurisdictional amount may be assumed in cases such as this. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). The Court stated that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the

jurisdictional amount provided for in § 1331(a)." *Id.* at 98. Because this is an action arising under the laws of the United States and there is more than $10,000 in controversy, the court has jurisdiction under 28 U.S.C.A. § 1331.[4]

Sovereign Immunity

Defendants also contend in this preanswer motion that this suit, filed against a federal agency and three federal officials, is actually against the sovereign and therefore barred by the doctrine of sovereign immunity. A suit is against the sovereign if the "effect of the judgment would be 'to restrain the Government from acting or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963), citing *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 704 (1949). Because it is without question that the effect of a judgment in favor of Minnesota would be to compel defendants to comply with state pollution abatement requirements, this is a lawsuit against the sovereign.

It is an elementary principle of law that a suit against federal officials is not barred by the doctrine of sovereign immunity if those officials are acting beyond their statutory powers. The Court in *Larson, supra,* said:

[4] Section 1365 was intended to encourage "citizen participation in the enforcement" of this Act. 1972 U.S. Code, Cong. & Admin. News p. 3745. The sixty day notice provision was intended to afford the alleged polluter an opportunity to comply with the terms of the Act and thus avoid the necessity of a lawsuit. Plaintiff has engaged in protracted negotiation with defendants seeking to settle this controversy. All through those negotiations and through this lawsuit, defendants have maintained that they do not have to comply with Minnesota's pollution abatement requirements. Thus, in this case, the purpose behind the sixty-day notice provision would not be served by dismissing this lawsuit. In addition, judicial economy would certainly not be promoted. Plaintiff's counsel has stated that if this lawsuit were dismissed on jurisdictional grounds, the State would merely give notice, wait sixty days and refile the same complaint.

> Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be the object of specific relief.

Larson, supra, at 689.

In its complaint, plaintiff has alleged that §§ 1311 and 1323 are statutory constraints on defendants' powers which require them to comply with Minnesota pollution abatement requirements. Therefore, if plaintiff's allegations are true, defendants are acting *ultra vires* their authority and may not rely on sovereign immunity.

In addition, it is clear from the language of this Act and its legislative history that Congress intended to waive sovereign immunity as to any action brought to enforce the terms of the Act. The report of the Senate Committee on Public Works on § 1323 indicates that federal facilities must "meet all control requirements as if they were private citizens." 1972 U.S. Code, Cong. & Admin. News p. 3734. Section 1365, discussed above, allows any person adversely affected by the polluter to bring an enforcement action in the district courts. The committee report on this section states that:

> [An] enforcement action might be brought against an individual or government agency. As recognized under section 313 of the bill [§ 1323], Federal facilities generate considerable water pollution. Since some Federal agencies such as the Department of Defense have failed in abating pollution and in requesting appropriations to develop con-

trol measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 313 [§ 1323].

1972 U. S. Code, Cong. & Admin. News. p. 3746.

These sections of the Act and the pertinent legislative history clearly indicate that Congress intended federal agencies and federal officers to have the same obligations under this Act as any other person would have. The inevitable consequence of this intention is that sovereign immunity does not bar a suit against federal officials or agencies to enforce the terms of the Act.

Federal Compliance

We come to the principal question at issue—whether federal agencies must obtain state discharge permits.

The objective of this legislation is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C.A. § 1251. In order to reach this objective, Congress established as one of its goals the elimination by the year 1985 of the discharge of pollutants into navigable waters. Further, Congress recognized that it is the primary responsibility and right of the states "to prevent, reduce, and eliminate pollution," and it committed the federal government to provide "technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution." *Id.*

In order to accomplish this awesome objective, Congress directs the Administrator of the Environmental Protection Agency to establish, and regularly revise, limitations on the quantity of pollutants which may be discharged into navigable waters. These effluent limitations are to be enforced through permit systems, the most important of which are the permit

systems established pursuant to § 1342. That section authorizes states to establish and administer permit programs and directs the Administrator of the E.P.A. to approve these state programs if they meet prescribed standards. If a state does not have a permit program or if a state's approved program does not regulate a specific type of discharge, the Administrator may issue a permit for the discharge if the discharge meets the established effluent limitations. The language of the Act and its legislative history make it clear, however, that these state permit programs are to be the primary enforcement mechanism under the Act.

> . . . The Federal Government as the custodian of the navigable waters has the responsibility to control affirmatively any discharges of pollutants into the navigable waters and, under the committee bill, seek to achieve elimination of the discharge of pollutants.
>
> It is expected that the States will play a major role in the administration of this program.
>
> The committee believes that, after a transition period, during which the State program and capability will be upgraded, the program should be administered by those States with programs which meet the requirements of this Act.
>
> Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal Permit Program.

1972 U. S. Code, Cong. & Admin. News, p. 3737.

With this background in mind, a reading of § 1323 and its legislative history clearly indicates that, as a general rule, fed-

eral agencies are subject to state permit requirements. That section directs that:

> [e]ach department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . engaged in any activity resulting, or which may result, in the discharge . . . of pollutants shall comply with . . . State, . . . and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

The Court of Appeals for the Ninth Circuit, when confronted with this question, relied on the last clause quoted above, in deciding that federal facilities have to obtain state permits. *California v. Environmental Protection Agency*, 511 F.2d 963 (9th Cir.), cert. granted —— U.S. ——, 95 S. Ct. 2655 (1975). That case interpreted "reasonable service charges" as including charges incident to state permit programs. *Id.* at 970. However, the answer to this question seems to come more directly from a reading of the whole Act. Congress, recognizing that federal agencies are among the major polluters of this nation's waterways, *see, e.g.* Committee Report on § 1365, 1972 U.S. Code, Cong. & Admin. News, p. 3746, directed those agencies to comply with state "requirements respecting control and abatement of pollution. . . ." 33 U.S.C.A. § 1323. This is an unqualified order to comply. The Act draws no distinction between substantive compliance and procedural compliance. Further, to exempt federal agencies from state permit requirements, the primary enforcement mechanism established by the Act, could allow those agencies to exceed the applicable effluent limitations promulgated pursuant to the Act.

Defendants contend that even if federal agencies must, as a general rule, obtain state discharge permits, § 1344 exempts dredging operations from all state regulatory programs authorized by § 1342(b). In order to answer this final question, it is necessary to closely examine the relation among §§ 1342 (a), 1342(b) and 1344.

The first sentence of § 1342(a) indicates that there are basically three types of federal enforcement programs which operate in the absence of an approved state program. First, the Administrator may "permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision." 33 U.S.C.A. § 1328(a). Second, the Administrator and the Secretary of the Army may provide for and regulate the discharge of dredged or fill material into navigable waters. 33 U.S.C.A. § 1344. Finally, § 1342(a) regulates all other discharges. However, § 1342(b) authorizes the governor of each state to establish a permit program to regulate "discharges into navigable waters within its jurisdiction. . . ." Section 1362(16) defines "discharge" as "a discharge of a pollutant" or "a discharge of pollutants," and § 1362(6) defines "pollutant" as including "dredged spoil." Thus, clearly § 1342 (b) authorizes the establishment of state permit programs which regulate, among other things, the discharge of dredged material into navigable waters. The Conference Committee report on § 1344 stated, although in a different context, that "[c]onsistent with the intent of this Act, the conferees expect that the disposal activities of private dredgers and the Corps of Engineers will be treated similarly." 1972 U.S. Code, Cong. & Admin. News p. 3819.

Defendants urge that because § 1344 specifically deals with the disposal of dredged spoil, it alone must be referred to in answering this question. However, this Act offers a comprehensive, albeit a complex, regulatory scheme to restore this nation's water resources. This legislation and its history indicate that restoration is to be accomplished by effluent limitations promulgated by the Administrator but enforced by the states aided by federal funding and technical assistance. In isolation § 1344 might appear to be the only provision applicable to dredging. However, taken in context, it is clear that § 1344 is applicable only if there is no approved state permit program or if the approved state program does not attempt to regulate dredging. 33 U.S.C.A. § 1342(c). However, because Minnesota has an approved state program, a program which covers the dredging operations in question, 39 Fed. Reg. 26061, § 1344 does not come into play.

Finally, defendants argue that to compel them to obey state requirements would impair their authority to maintain navigation in violation of the protection afforded by § 1371. That section provides that:

> [t]his chapter shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation. . . .

Compelling defendants to comply with state permit requirements would not affect the Secretary's authority to maintain navigation. It would merely require the Secretary and the Corps of Engineers to accomplish this mission in compliance with effluent limitations established pursuant to the Act.

In summary, the language and legislative history of the Water Pollution Control Act clearly indicates that the objectives of the Act are to be met primarily by the states thru adequate pollution control programs vigorously enforced. Section 1342(b) authorizes states to establish permit programs to regulate discharges of all pollutants. Minnesota's plan, which has the approval of the Administrator, regulates the discharge of dredged spoil into navigable waters.

Accordingly, the court declares that § 1342(b) grants to Minnesota authority to require defendants to comply with state pollution abatement requirements including obtaining a state discharge permit.

It is ORDERED that plaintiff's motion for summary judgment is GRANTED and defendants' motion for summary judgment is DENIED.

Dated: October 9, 1975.

EDWARD J. DEVITT
Chief Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1869

STATE OF MINNESOTA, By Its Attorney General, WARREN SPANNAUS, And Its Pollution Control Agency,
Appellee,

vs.

MARTIN R. HOFFMAN, As Secretary of the Army, Et Al.,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

Submitted: May 12, 1976
Filed: October 28, 1976

Before BRIGHT and WEBSTER, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

TALBOT SMITH, Senior District Judge.

The case before us is one of first impression and involves the dredging operations of the Army Corps of Engineers. The

* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, Southern Division, sitting by designation.

various procedural arguments made below have not been pursued on appeal. The issue, the parties are agreed, is the authority of the State of Minnesota under the Federal Water Pollution Control Act Amendments of 1972 (hereafter "the Amendments"), 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (Supp. IV), to regulate the Corps of Engineers of the United States Army, in the Corps' conduct of dredging operations in the navigable waters[1] of the United States, within Minnesota. The District Court, writing before the recent interpretation of the 1972 Amendments by the Supreme Court in *EPA v. California ex rel. State Water Resources Control Board,* —— U.S. ——, 44 U.S.L.W. 4781 (June 7, 1976), held that § 402(b) of the Amendments, 33 U.S.C. § 1342(b) (Supp. IV), establishing the National Pollutant Discharge Elimination System (hereafter "NPDES"), "grants to Minnesota authority to require defendants to comply with state pollution abatement requirements including obtaining a state discharge permit." *Minnesota, Spannaus v. Callaway,* 401 F. Supp. 524, 531 (D. Minn. 1975). We reverse and remand for the entry of judgment in accordance herewith.

The original Federal Water Pollution Control Act was passed in 1948,[2] frequently revised, and codified at 33 U.S.C. § 1151 *et seq.* It proved to be inadequate.[3] The result was the enactment of the Amendments of 1972, their objective being

[1] The term, "navigable waters," as here used means "the waters of the United States, including the territorial seas." Amendments § 502(7), 33 U.S.C. § 1362(7) (Supp. IV). That the Congress intended to extend the Act's jurisdiction to the constitutional limit is clear from the Conference Committee report, S. Rep. No. 92-1236, 92d Cong. 2d Sess. 144 (1972) and 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (compiled for the Senate Comm. on Public Works by the Library of Congress), Ser. No. 93-1 at 327 (1973) (hereafter "Leg. Hist.").

[2] Act of June 30, 1948, 62 Stat. 1155.

[3] *See State Water Resources Control Board, supra,* 44 U.S.L.W. at 4781.

"to restore and maintain the chemical, physical, and biological integrity of the Nation's water."[4]

Although the Amendments retained the basic policy placing primary responsibility for the control of water pollution in the states,[5] two major changes were made. The first imposes direct restrictions on discharges of pollutants, phrased in terms of "effluent limitations" on "point sources," thus making it unnecessary, as had been the case theretofore, to work backwards from a polluted body of water to determine the point source of the pollution.[6] The second major change was the establishment of the National Pollutant Discharge Elimination System (NPDES)[7] for the purpose of attaining and enforcing the effluent limitations.

The Bill of Complaint alleged that the Corps of Engineers, for the purpose of aiding commercial navigation, maintains a navigation channel in the Mississippi River, various harbors on Lake Superior, and a harbor on Lake of the Woods by its dredging operations. These dredging operations are alleged to have caused deterioration in water quality.[8] Both federal law and state law were relied upon and violations of both were alleged. The relief requested was a declaratory judgment that the "applicable federal law requires the dredging activity of the defendants to be carried out within the ambit of state laws and regulations," and that the dredging ac-

[4] § 101(a)(1), 33 U.S.C. § 1251(a)(1) (Supp. IV).
[5] *See* § 101(b), 33 U.S.C. § 1251(b) (Supp. IV).
[6] *See* § 311(b), 33 U.S.C. § 1311(b) (Supp. IV). The terms "effluent limitation" and "point source" are defined in § 502 (11), 33 U.S.C. § 1362(11) (Supp. IV), and § 502(14), 33 U.S.C. § 1362(14) (Supp. IV), respectively.
[7] § 402, 33 U.S.C. § 1342 (Supp. IV).
[8] The Corps points out that it is under a duty to maintain a nine foot channel in the Mississippi River, 47 Stat. 55, and a twenty-eight foot channel for the Duluth-Superior Harbor, River and Harbor Act of 1960 § 101, 74 Stat. 480, 482.

tivities of the defendants within the State of Minnesota "be conducted in accordance with the Minnesota Statutes and Regulations regarding water quality."

The Corps moved to dismiss under Fed. R. Civ. P. 12(b), arguing that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim for which relief could be granted. Oral argument on the motion was held, and, as the parties agreed that no question of material fact existed, the District Court considered the matter submitted on cross-motions for summary judgment, granted the state's motion, and denied that of the Corps.

First, the District Court's conclusion that the Corps is required to obtain discharge permits from the State of Minnesota cannot be maintained, in light of *State Water Resources Control Board, supra.* In, *State Water Resources Control Board*, the Supreme Court held that agencies of the federal government do not need to obtain NPDES discharge permits from the states.[9]

[9] There are actually two Minnesota permit programs involved in this case. The first, established under Minn. Stat. § 115.03 subds. 1(e) & 5 (1974), is the Minnesota NPDES program, which § 402(b) of the Amendments, 33 U.S.C. § 1342(b) (Supp. IV), authorizes. Minnesota's NPDES program has been approved by EPA, *see* 39 Fed. Reg. 2606 (July 16, 1974). The second, the Minnesota Disposal System, Minn. Stat. § 115.07, is an independent state permit program, not authorized by federal law, and not submitted to EPA for approval. As a matter of practice, Minnesota issues one permit to water polluters, designated as both a Minnesota Disposal System permit and a Minnesota NPDES permit.

While compliance by federal agencies with independent state permit programs was not directly at issue in *State Water Resources Control Board, supra*, the rationale for that decision leads, *a fortiorari*, to the conclusion that the Corps need not obtain such permits. The Court's rationale in *State Water Resources Control Board* was that there had not been a clear and unequivocal waiver, by Congress, of federal immunity from state regulation with respect to state administered NPDES permit programs. Unlike state NPDES permit programs, the Minnesota Disposal system is not authorized by Congress, hence the case for finding a waiver of federal immunity is much weaker with respect to it than with respect to state NPDES programs.

We turn now to the major question posed by this case. In support of its argument that the Corps is required to conform to the State's water quality standards and effluent limitations, Minnesota relies primarily upon two sections of the Amendments, § 313, 33 U.S.C. § 1323 (Supp. IV), and § 510, 33 U.S.C. § 1370 (Supp. IV). The former, § 313, requires that:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. * * *

This provision of the Amendments, it is argued, "clearly and explicitly requires Federal entities to comply with State requirements respecting the control and abatement of pollution." In addition, in support of its position, the State urges to us the requirements of § 510, 33 U.S.C. § 1370 (Supp. IV), providing, in part, that:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; * * *.

The Corps, per contra, raises a basic constitutional issue, asserting that the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2), absent Congressional authorization,

bars state regulation of its dredging operations, which are performed in the navigable waters of the United States to maintain navigation, and that Congress has nowhere in the 1972 Amendments authorized such state regulation. Per contra, it urges that § 404 of the Amendments, 33 U.S.C. § 1344 (Supp. IV), creates an exclusive program for dredged or fill material, including dredged spoil. Under this section, it is argued, the sole and exclusive responsibility for the administration of the program is vested in the Secretary of the Army, acting through the Chief of Engineers, and no provision is found therein for administration by the EPA or by any state. Section 404 provides as follows:

> PERMITS FOR DREDGED OR FILL MATERIAL
>
> SEC. 404. (a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.
>
> (b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect of municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

With respect to the above-quoted section, the Corps points out that § 402, 33 U.S.C. § 1342 (Supp. IV), the section creating the NPDES, commences with an exception, manifesting a Congressional intent that the EPA not exercise administrative authority over the pollutant covered by § 404, namely,

> (a)(1) *Except as provided in sections 318 and 404 of this Act*, the Administrator[10] may * * * issue a permit for the discharge of any pollutant * * *. (Emphasis and added footnote ours.)[11]

[10] The Administrator here referred to is the Administrator of the EPA. § 101(d), 33 U.S.C. § 1251(d) (Supp. IV).

[11] Note that the exception in § 402, "except as provided in section[] * * * 404," provides another basis, independent of the Supreme Court decision in *State Water Resources Control Board, supra*, for holding that the Corps does not have to obtain a Minnesota NPDES permit. *See* note 31 *infra*.

At the heart of the controversy, then, is the basic question of the existence and extent, if any, of the authority of the state, purportedly embodied principally in § 313, 33 U.S.C. § 1323 (Supp. IV), and § 510, 33 U.S.C. § 1370 (Supp. IV), over the Corps of Engineers as to the Corps' dredging for the purpose of aiding commercial navigation, in the light of the heretofore cited provisions relied upon by the Corps, principally §§ 402, 33 U.S.C. § 1342 (Supp. IV) and 404, 33 U.S.C. § 1344 (Supp. IV).

The legislative history of the 1972 Amendments is extensive[12] and we have reviewed it in detail. The Senate version of the Amendments, S.2770,[13] as reported out of the Senate Committee on Public Works, did not contain a special provision on dredging. The only special provision in the bill on dredging was §401(c):

> In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.[14]

As reported out of the Senate Committee on Public Works, § 402 of S.2770 would have included the disposal of dredged spoil in the NPDES, requiring that a permit be obtained from

[12] The legislative history of the 1972 Amendments has been compiled for the Senate Committee on Public Works, by the Library of Congress, in two volumes containing 1,766 pages.

[13] 92d Cong., 1st Sess., 2 Leg. Hist. 1534 (1971).

[14] S.2770 at 151-52, 2 Leg. Hist. at 1684-85. Section 401(c) of S.2770 became § 401(c) of the Amendments, 33 U.S.C. § 1341(c) (Supp. IV), without amendment.

the EPA Administrator. During the Senate floor debate on S.2770, Senator Ellender, of Louisiana, introduced the following amendment:

> At page 161, between lines 7 and 8 add new section:
>
> Sec. 404. (a) The Secretary of the Army may issue permits, after notice and opportunity for public hearing, for the discharge of dredged materials into navigable waters at specified disposal sites.[15]
>
> (b) In identifying disposal sites for the purposes of subsection (a), the Secretary shall apply the criteria established pursuant to subsection (c) (1) of section 403 together with an evaluation of the impact of such sites on navigation and anchorage. In applying such criteria, the Secretary in cooperation with the Administrator, shall determine those sites which would not adversely affect shellfish beds, fisheries (including spawning and breeding areas) or recreation areas. (Footnote ours.)

2 Leg. Hist. at 1386. In explanation of his amendment Senator Ellender said:

> It simply retains the authority of the Secretary of the Army to issue permits for the disposal of dredged materials. This is essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States.

Id.

In explaining subsection (b) of his amendment, Senator Ellender amplified his concern with the maintenance of navigation:

> * * * The Secretary of the Army will not be obligated

[15] We note the similarity between the language of the amendment proposed as § 404(a) and that ultimately enacted.

> to require strict compliance with the effluent requirements established by the Environmental Protection Agency in issuing permits. The strict adherence to the published standards would result in 90 percent of the ports and harbors of the United States being closed, until such time as land disposal areas are provided. This would create a catastrophical situation with respect to our foreign and domestic commerce.

Id. at 1387.

Senator Muskie spoke in opposition to the Ellender amendment, arguing, in part:

> What Senator Ellender's amendment would do would be to exempt dredging. There is no question that the Secretary of the Army should retain authority to permit dredging operations for the purpose of navigable water and channel maintenance. It is a mission-oriented agency, and this is its mission. We do not undertake to turn that mission over to anybody else, and that specific activity should not be interfered with by the Environmental Protection Agency.
>
> But, conversely, spoil disposal should be subject to EPA regulations. Spoil disposal is a pollutant. Any person who wished to dump polluted dredge spoil into navigable waters would be required, under this section, to get a permit from EPA or the State, just as would be required of other discharges.

Id. at 1388.

The House version of the Amendments, H.R. 11896,[16] differed from the Senate version as to the disposal of dredged material into the navigable waters. Section 404(a) thereof provided, as does § 404 of the Amendments, 33 U.S.C. § 1344

[16] 92d Cong., 2d Sess., 1 Leg. Hist. 893 (1972).

(Supp. IV), for the Secretary of the Army to issue the specified permits, upon his determination that "such discharge [would] not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." In making this determination, the Secretary was to apply, *inter alia*, guidelines promulgated by the Administrator, but in the event of conflict, the Secretary was to have had the final decision-making authority.[17]

The report of the House Committee on Public Works stated:

> The Committee expects that until such time as economic and feasible alternative methods for disposal of dredge material are available, *no arbitrary o[r] unreasonable restrictions shall be imposed on dredging activities essential for the maintenance of interstate and foreign commerce*, and that, consistent with the intent of this Act, the Committee expects the disposal activities of private dredgers and the Corps of Engineers will be treated in a similar manner. (Emphasis ours.)[18]

Minnesota argues that the second portion of the quoted paragraph, regarding similar treatment of private dredgers and the Corps, supports its position. It says, in substance, that since private dredging is subject to state regulation, "the Corps activities can only be similarly treated if they are also subject to State regulation."[19] However, as may be observed, the House Committee expressed only an intent that private dredgers and the Corps be given similar but not identical,

[17] H.R. 11896 § 404(b), 1 Leg. Hist. at 1063-64. The Secretary of the Army would have been allowed to disregard the Administrator's guidelines and recommendations when he determined that there was "no economically feasible alternative reasonably available."
[18] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. at 130, 1 Leg. Hist. at 817.
[19] Brief for Minnesota at 22.

treatment.[20] In any event, identical treatment of Corps dredging and private dredging is not possible. Private dredgers, like all other "applicants" for federal permits, must obtain water quality compliance certificates from the states in order to obtain federal permits. § 401(a), 33 U.S.C. § 1341(a) (Supp. IV).[21] Federal agencies are not "applicants," § 401(a)(6), 33 U.S.C. § 1341(a)(6) (Supp. IV), and thus they need not obtain state certificates of water quality compliance.

The sentence relied upon by Minnesota, is, however, construed out of context. The language concerning similar treatment for Corps dredging and private dredging occurs immediately after the Committee expresses its concern that unreasonable restrictions not be placed "on dredging activities essential for the maintenance of interstate and foreign commerce." It is the dredging activities of the Corps which are essential for the maintenance of commerce.

In the Conference Committee a compromise was reached on the treatment of dredged spoil as a pollutant. The Conferees adopted a version substantially similar to the House version, the major difference being that the Conference version gives the EPA Administrator a veto power over the Secretary of the Army in the issuance of permits.[22]

[20] As enforced by Department of the Army regulations, § 404 does provide for similar treatment of the disposal activities of private persons and those of the Corps. The guidelines promulgated by the EPA Administrator, in conjunction with the Secretary of the Army, under § 404(b), have been recognized by the Army to be applicable to the Corps' dredging activities. *See* 33 C.F.R. § 209.145 (a) (1975). Furthermore, the Army recognizes that the limited veto power over the specification of disposal sites given to the Administrator in § 404(c) applies to the Corps' own projects. *See* 33 C.F.R. § 209.145(b)(1) (1975). Additionally, the Corps has devised a procedure functionally equivalent to permit issuance for its own dredging projects. *See* 33 C.F.R. § 209.145(f)(1)(vii) (1975).
[21] *See also* 33 C.F.R. § 209.120(f)(3) (1975); 40 C.F.R. Part 230, 40 Fed. Reg. 11292-93 (Sept. 5, 1975).
[22] § 404(c), 33 U.S.C. § 1344(c) (Supp. IV). This veto power will be discussed in more detail, *infra*.

As enacted, § 404 of the Amendments, 33 U.S.C. § 1344 (Supp. IV), follows the House version in placing the authority for issuing permits for the discharge of dredged spoil in the Secretary of the Army, acting through the Chief of Engineers. However, subsection (b) of § 404 requires the Secretary of the Army to apply guidelines developed by the EPA Administrator, in conjunction with the Secretary of the Army, in specifying disposal sites.[23] If the guidelines would alone prohibit the specification of a disposal site, the Secretary of the Army may also consider "the economic impact of the site on navigation and anchorage." § 404(b), 33 U.S.C. § 1344(b) (Supp. IV). Subsection (c) of § 404 gives the EPA Administrator a veto power over the specification and use of defined areas as disposal sites when he determines "that the discharge of [dredged or fill] materials into such areas[s] will have an unacceptable adverse effect on municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[24]

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[23] The EPA Administrator has promulgated interim final guidelines, 40 C.F.R. Part 230, 40 Fed. Reg. 11292 (Sept. 5, 1975).

[24] The Department of the Army recognizes that the Administrator's, but not a state's, veto power is applicable to the dredging projects of the Corps of Engineers. 33 C.F.R. § 209.145(b)(1) (1975), which is applicable to the dredging projects of the Corps, 33 C.F.R. § 209.145(a) (1975), provides, in relevant part:

> * * * Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shell fish beds and fishery areas, wildlife or recreation areas.

Another explanation of the final version of the Amendments was provided by Senator Muskie, who explained the final version in the following terms:

> PERMITS FOR DREDGED OR FILL MATERIAL [Section 404]
>
> A major difference between the Senate bill and the House amendment related to the issue of dredging. The Senate Committee had reported a bill which treated the disposal of dredged spoil like any other pollutant. Pursuant to an amendment accepted on the Senate floor, dredged spoil disposal was made subject to a different set of criteria to determine any environmental effects. The House bill not only established a different set of criteria to determine the environmental effects of dredged spoil disposal but also designated the Secretary of the Army rather than the Administrator of the Environmental Protection Agency as the permit issuing authority. The Conference agreement follows those aspects of the House bill which related to the Secretary of the Army's regulatory authority. However, consistent with the Senate provision, the Administrator of the Environmental Protection Agency has three clear responsibilities and authorities.
>
> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate Section 301(a).
>
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.
>
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

1 Leg. Hist. at 177.

The Conference Committee report, like the House and Senate Committee reports, expressed the intent that dredging activities necessary for the maintenance of commerce not be unreasonably impeded:

> The Secretary and the Administrator shall act promptly on dredging permits essential for the maintenance of interstate commerce because of the seasonal nature of dredging nad the need to preschedule scarce dredging equipment.
>
> It is expected that until such time as feasible alternative methods for disposal of dredged or fill material are available, unreasonable restrictions shall not be imposed on dredging activities essential for the maintenance of

interstate and foreign commerce. Consistent with the intent of this Act, the conferees expect that the disposal activities of private dredgers and the Corps of Engineers will be treated similarly.

S. Rep. No. 92-1236, *supra* at 142, 1 Leg. Hist. at 325.

The State of Minnesota is subject to the authority of the United States Government in the matter before us. We start with the

seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states and cannot be controlled by them." *McCulloch v. Maryland*, 4 Wheat. 316, 426 (1819). From this principle is deduced the corollary that

"[i]t is the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence." *Id.*, at 427.

The effect of this corollary, which derives from the Supremacy Clause and is exemplified in the Plenary Powers Clause giving Congress exclusive legislative authority over federal enclaves purchased with the consent of a State, is "that the activities of the Federal Government are free from regulation by any State." As Mr. Justice Holmes put it in *Johnson v. Maryland*, 254 U.S. 51, 57 (1920),

"the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them. . . ."

Taken with the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign" "without a clear expression or implication to that effect," this immunity means that where "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. *Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."*

Hancock v. Train, —— U.S. ——, 44 U.S.L.W. 4767, 4771 (June 7, 1976) (footnotes omitted and emphasis added).[25]

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[25] *See also State Water Resources Control Board, supra*, respecting the Act before us:

Our decision in this case is governed by the same fundamental principles applied today in *Hancock v. Train*, * * *: federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous. As in *Hancock v. Train*, we must determine whether Congress has subjected federal installations to the degree of state control urged by the States.

44 U.S.L.W. at 4784.

With these considerations and the Congressional debates in mind, we look to the principal arguments relied upon by the State, namely §§ 313, 33 U.S.C. § 1323 (Supp. IV), and 510, 33 U.S.C. § 1370 (Supp. IV), of the Amendments.

Minnesota seeks to find support for its position by virtue of the fact that Congress, in § 313, removed and asserted ambiguity in the prior law, § 21(a) of the Water Quality Improvement Act of 1970, 33 U.S.C. § 1171(a) (1970), by requiring federal agencies to "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements * * *."[26] There is no doubt that the prior law as to the duty of Federal facilities and activities to comply with the requirements of pollution control laws has been strengthened but this strengthening does not directly address the problem at hand: Whether Congress intended to waive the immunity of the Corps of Engineers from state regulation of those dredging activities of the Corps which are essential for the maintenance of interstate commerce. Nor is there any indication in the legislative history of § 313 that Congress intended to subject the disposal of dredged material by the Corps to state law.

Section 313 constitutes a general authorization on the part of Congress, that "[e]ach * * * agency * * * of the Federal Government * * * shall comply with Federal, State, interstate,

[26] Section 21(a) of the 1970 Act provided in relevant part:

> Each Federal agency * * * having jurisdiction over any real property or facility, or engaged in any Federal public works activity of any kind, shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this Act in the administration of such property, facility, or activity.

and local requirements respecting control and abatement of pollution." Minnesota urges that the words are clear and unambiguous and hence there is no need to look at the legislative history or other sections of the Amendments. We have seen, however, only recently, that § 313 is to be construed in the light of the Congressional intent with respect thereto. *State Water Resources Control Board, supra.* The problem arises from the fact that words do not construe themselves.

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. (Citation omitted.) The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

United States v. Dickerson, 310 U.S. 554, 562 (1940) (Murphy, J.) (footnote omitted).[27]

Moreover, a statute will not be read literally if such a reading leads to a result that conflicts with Congress' intent. In *Helvering v. New York Trust Co.,* 292 U.S. 455, 464-65 (1934), in addressing this point the Court stated:

> But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. * * * Quite recently in

[27] *See also Kokoszka v. Belford,* 417 U.S. 642, 650 (1974).

> *Ozawa v. United States*, 260 U.S. 178, we said (p. 194): "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation, as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Thus, what is asserted to be the literal meaning of § 313 must be interpreted to give effect to the intent of Congress that the Corps is not to be hampered in maintaining navigation.[28] What we are here dealing with is a specific agency, the Corps of Engineers, performing a specific federal function, the clearing of the channels of interstate commerce for purposes of navigation,[29] its responsibility being delineated in a special section of the Act, § 404, 33 U.S.C. § 1344 (Supp. IV). Unlike all other pollutants, dredged spoil is not regulated under the NPDES, § 402, 33 U.S.C. § 1342 (Supp. IV), since § 402(a)(1) establishing the NPDES begins, as we have seen,[30] with the

[28] The intent of the Congress to maintain navigation finds further support in § 511(a)(2), 33 U.S.C. § 1371(a)(2) (Supp. IV), stating that the 1972 Amendments "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation * * *."

[29] That federal power over navigation and navigable waters is plenary and predominant, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958).

[30] *Supra* at p. 7.

words, "[e]xcept as provided in sections 318 and 404."[31]

With respect to § 510, 33 U.S.C. § 1370 (Supp. IV), quoted *supra* at p. 6, Minnesota asserts that "[t]his unequivocal language was passed in direct response to claims such as the Corps is making in this case."[32] A careful reading of § 510, however, makes it clear that this section does not purport to grant the states any new authority. By its terms, § 510 is designed only to prevent the Amendments from "preclud[ing] or deny[ing] the right of any State * * * to adopt or enforce" pollution control requirements. Thus it prevents the Amendments from pre-empting the states from adopting higher pollution control standards than those established under the Amendments.[33] The Corps does not argue preemption. Section 510 does not address the issue of state control over the Corps' dredging essential for the purpose of maintaining navigation.

There is a suggestion by amici that failure to impose upon the Corps of Engineers the requirements of state water pollution control may result in action by the Secretary of the Army inimical to proper environmental considerations. The Act is not so construed by the Army and the EPA. Both the EPA guidelines[34] and the Army's regulations[35] bear directly on

[31] That dredged spoil is not regulated under the NPDES is true whether the NPDES permit program is administered by EPA pursuant to § 402(a), or by a state, pursuant to § 402(b). As can be seen from the structure of § 402 (*E.g.*, § 402(a)(3), stating that the NPDES program is subject to "the same terms, conditions, and requirements" whether administered by the states or EPA, as well as § 402(c), stating that any state permit program under this section shall be in accord with § 402), the NPDES is a particularized unitary program. Thus state-administered NPDES permit programs, as well as EPA-administered NPDES programs are limited by the exceptions delineated in § 402(a)(1).

[32] Brief for Minnesota at 15.

[33] *See also* H.R. Rep. No. 92-911, *supra* at 136, 1 Leg. Hist. at 823.

[34] 40 C.F.R. Pt. 230, 40 Fed. Reg. 41292 (Sept. 5, 1975).

[35] 33 C.F.R. Pt. 209, *as amended*, 40 Fed. Reg. 31320 (July 25, 1975).

this point. Under the guidelines, evaluation criteria, expressly made applicable to the Corps of Engineers,[36] are developed for all proposed discharges of dredged or fill material.[37] The regulations controlling the Corps, in turn, require the Corps to consider the environmental, as well as the social and economic consequences of its civil projects.[38] It appears also[39] that the Corps is currently conducting a study of the environmental effects of the disposal of dredged material,[40] which, we are aiso told, is being applied in implementing § 404, 33 U.S.C. § 1344 (Supp. IV), to assure that all discharges of dredged material result in the least environmental harm possible.

In light of the principles we have discussed, the Supremacy Clause, the legislative history of the Act, as well as its internal structure, we find with respect to the disposal of dredged material by the Corps, that there is insufficient evidence to meet the clear and unequivocal standard for finding Congressional authorization for state regulation under the teachings of *Hancock, supra,* and *State Water Resources Control Board, supra,* whether by authorization under the NPDES or independently thereof. Although environmental considerations were matters of grave concern to the Congress, and obviously so to both the Environmental Protection Administration and the Secretary of the Army, as appears clearly from their respective guidelines and regulations, the overriding concern of the Congress in this context was for the maintenance of un-

[36] 40 C.F.R. § 230.1(b)(2), 40 Fed. Reg. 41293 (Sept. 5, 1975).
[37] The evaluation criteria are stated in 40 C.F.R. § 230.4-230.5, 40 Fed. Reg. 41294-96.
[38] *See* 33 C.F.R. § 209.410 (1975); 33 C.F.R. § 209.145(f) (1975).
[39] *See* Reply Brief for Minnesota at 4. [sic].
[40] Authorized by the River and Harbor Act of 1970 § 123(i), 33 U.S.C. § 1165a(i) (1970).

impeded traffic in the navigable waters of the United States. Regulation by the various States of the Union, each with its own requirements, could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another. We find no authorization of such state regulation in the legislative history of the Act or its several sections. We hold that the Congress did not intend a subordination of the federal power and authority in this area to State control.

Reversed and remanded for entry of judgment in accordance herewith.

A true copy.

ATTEST:
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX D(1)

JUDGMENT

United States Court of Appeals
For The Eighth Circuit
No. 75-1869
September Term, 1976

State of Minnesota, by its Attorney General, Warren Spannaus and its Pollution Control Agency,

Appellee,

vs.

Martin R. Hoffman, Secretary, Department of the Army; Corps of Engineers, Department of the Army; Lt. Gen. William C. Gribble, Chief of Engineers, Department of the Army; and Colonel Max Noah, District Engineer, Corps of Engineers,

Appellants.

Natural Resources Defense Council, Amicus Curiae
State of California, Amicus Curiae

APPEAL FROM the United States District Court for the District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

October 28, 1976

A true copy.

Attest:

Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX D(2)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1869

STATE OF MINNESOTA, by its Attorney General, WARREN SPANNAUS, and its Pollution Control Agency,

Plaintiffs,

vs.

Martin R. Hoffman, Secretary Department of the Army; Corps of Engineers, Department of the Army; Lt. Gen. William C. Gribble, Chief of Engineers, Department of the Army; and Colonel Max Noah, District Engineer, Corps of Engineers,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Minnesota by its Attorney General and its Pollution Control Agency, the plaintiffs above named, hereby appeal to the Supreme Court of the

United States from the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on October 28, 1976.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
By ELDON G. KAUL
Assistant Attorney General
WILLIAM P. DONOHUE
Special Assistant Attorney General
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Attorneys for Plaintiffs

DATED: January 4, 1977

APPENDIX E

ARTICLE VI, CLAUSE 2 (SUPREMACY CLAUSE)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Con-

stitution or Laws of any State to the Contrary notwithstanding.

APPENDIX F(1)

"DECLARATION OF GOALS AND POLICY

"Sec. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

"(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

"(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

"(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

"(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

"(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

"(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with

the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

"(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

"(d) Except as otherwise expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called 'Administrator') shall administer this Act.

"(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

"(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

APPENDIX F(2)
"FEDERAL FACILITIES POLLUTION CONTROL

"Sec. 313. Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, Interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

APPENDIX F(3)
"NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

"Sec. 402.(a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

"(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

"(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

"(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the at-

torney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such

notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

"(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

"(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

"(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

"(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

"(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

"(g) Any permit issued under this section for the discharges of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

"(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

"(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

"(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

"(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative dis-

position of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

APPENDIX F(4)

"PERMITS FOR DREDGED OR FILL MATERIAL

"Sec. 404. (a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

"(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of

any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

APPENDIX F(5)

"GENERAL DEFINITIONS

"Sec. 502. Except as otherwise specifically provided, when used in this Act:

"(1) The term 'State water pollution control agency' means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

"(2) The term 'interstate agency' means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

"(3) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

"(4) The term 'municipality' means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

"(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

"(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

"(7) The term 'navigable waters' means the waters of the United States, including the territorial seas.

"(8) The term 'territorial seas' means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

"(9) The term 'contiguous zone' means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

"(10) The term 'ocean' means any portion of the high seas beyond the contiguous zone.

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

"(12) The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

"(13) The term 'toxic pollutant' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"(14) The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

"(15) The term 'biological monitoring' shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

"(16) The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

"(17) The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

"(18) The term 'industrial user' means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category 'Division D—Manufacturing' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

"(19) The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

APPENDIX F(6)

"STATE AUTHORITY

"Sec. 510. Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

APPENDIX F(7)

"OTHER AFFECTED AUTHORITY

"Sec. 511. (a) This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 (30 Stat. 1112); except that any permit issued under section 404 of this Act shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 10 of the Act

of March 3, 1899, or (3) affecting or impairing the provisions of any treaty of the United States.

"(b) Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441—451b) shall be regulated pursuant to this Act, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

"(c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and

"(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

"(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or

"(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act."

APPENDIX G(1)

115.01 DEFINITIONS. Subdivision 1. The following words and phrases when used in chapter 115 and, with respect to the pollution of the waters of the state, in chapter 116, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section.

Subd. 2. "Sewage" means the water-carried waste products from residences, public buildings, institutions or other buildings, or any mobile source, including the excrementitious or other discharge from the bodies of human beings or animals, together with such ground water infiltration and surface water as may be present.

Subd. 3. "Industrial waste" means any liquid, gaseous or solid waste substance resulting from any process of industry, manufacturing trade or business or from the development of any natural resource.

Subd. 4. "Other wastes" mean garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, oil, tar, chemicals, dredged spoil, solid waste, incinerator residue, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, cellar dirt or municipal or agricultural waste, and all other substances not included within the definitions of sewage and industrial waste set forth in this chapter which may pollute or tend to pollute the waters of the state.

Subd. 5. "Pollution of water", "water pollution", or "pollute the water" means: (a) the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurous to public health, safety or welfare, to domestic, agricultural, commercial, industrial,

recreational or other legitimate uses, or to livestock, animals, birds, fish or other aquatic life; or (b) the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of waters of the state.

Subd. 6. "Sewer system" means pipe lines or conduits, pumping stations, and force mains, and all other constructions, devices, and appliances appurtenant thereto, used for conducting sewage or industrial waste or other wastes to a point of ultimate disposal.

Subd. 7. "Treatment works" means any plant, disposal field, lagoon, dam, pumping station, constructed drainage ditch or surface water intercepting ditch, incinerator, area devoted to sanitary land fills, or other works not specifically mentioned herein, installed for the purpose of treating, stabilizing or disposing of sewage, industrial waste, or other wastes.

Subd. 8. "Disposal system" means a system for disposing of sewage, industrial waste and other wastes, and includes sewer systems and treatment works.

Subd. 9. "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.

Subd. 10. "Person" means the state or any agency or institution thereof, any municipality, governmental subdivision, public or private corporation, individual, partnership, or other entity, including, but not limited to, association, commission or any interstate body, and includes any officer or governing

or managing body of any municipality, governmental subdivision, or public or private corporation, or other entity.

Subd. 11. "Agency" means the Minnesota pollution control agency.

Subd. 12. "Discharge" means the addition of any pollutant to the waters of the state or to any disposal system.

Subd. 13. "Pollutant" means any "sewage," "industrial waste," or "other wastes," as defined in chapter 115, discharged into a disposal system or to waters of the state.

Subd. 14. "Toxic pollutants" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the agency, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformation, in such organisms or their offspring.

Subd. 15. "Point source" means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

Subd. 16. "Standards" means effluent standards, effluent limitations, standards of performance for new sources, water quality standards, pretreatment standards, and prohibitions.

Subd. 17. "Schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

APPENDIX G(2)

115.03 POWERS AND DUTIES. Subdivision 1. The agency is hereby given and charged with the following powers and duties:

(a) To administer and enforce all laws relating to the pollution of any of the waters of the state;

(b) To investigate the extent, character, and effect of the pollution of the waters of this state and to gather data and information necessary or desirable in the administration or enforcement of pollution laws, and to make such classification of the waters of the state as it may deem advisable;

(c) To establish and alter such reasonable pollution standards for any waters of the state in relation to the public use to which they are or may be put as it shall deem necessary for the purposes of chapter 115 and, with respect to the pollution of waters of the state, chapter 116;

(d) To encourage waste treatment, including advanced waste treatment, instead of stream low-flow augmentation for dilution purposes to control and prevent pollution;

(e) To adopt, issue, reissue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, regulations, schedules of compliance, and stipulation agreements, under such conditions as it may prescribe, in order to prevent, control or abate water pollution, or for the installation or operation of disposal systems or parts thereof, or for other equipment and facilities;

(1) Requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the state resulting in pollution in excess of the applicable pollution standard established under this chapter;

(2) Prohibiting or directing the abatement of any discharge of sewage, industrial waste, or other wastes, into any waters of the state or the deposit thereof or the discharge into any municipal disposal system where the same is likely to get into any waters of the state in violation of this chapter and, with respect to the pollution of waters of the state, chapter 116, or standards or regulations promulgated or permits issued pursuant thereto, and specifying the schedule of compliance within which such prohibition or abatement must be accomplished;

(3) Prohibiting the storage of any liquid or solid substance or other pollutant in a manner which does not reasonably assure proper retention against entry into any waters of the state that would be likely to pollute any waters of the state;

(4) Requiring the construction, installation, maintenance, and operation by any person of any disposal system or any part thereof, or other equipment and facilities, or the reconstruction, alteration, or enlargement of its existing disposal system or any part thereof, or the adoption of other remedial measures to prevent, control or abate any discharge or deposit of sewage, industrial waste or other wastes by any person;

(5) Establishing, and from time to time revising, standards of performance for new sources taking into consideration, among other things, classes, types, sizes, and categories of sources, processes, pollution control technology, cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements. Said standards of performance for new sources shall encompass those standards for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the

agency determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants. New sources shall encompass buildings, structures, facilities, or installations from which there is or may be the discharge of pollutants, the construction of which is commenced after the publication by the agency of proposed regulations prescribing a standard of performance which will be applicable to such source. Notwithstanding any other provision of the law of this state, any point source the construction of which is commenced after May 20, 1973 and which is so constructed as to meet all applicable standards of performance for new sources shall, consistent with and subject to the provisions of section 306(d) of the Amendments of 1972 to the Federal Water Pollution Control Act, not be subject to any more stringent standard of performance for new sources during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169, or both, of the Federal Internal Revenue Code of 1954, whichever period ends first. Construction shall encompass any placement, assembly, or installation of facilities or equipment, including contractual obligations to purchase such facilities or equipment, at the premises where such equipment will be used, including preparation work at such premises;

(6) Establishing and revising pretreatment standards to prevent or abate the discharge of any pollutant into any publicly owned disposal system, which pollutant interferes with, passes through, or otherwise is incompatible with such disposal system;

(7) Requiring the owner or operator of any disposal system or any point source to establish and maintain such records, make such reports, install, use, and maintain such monitoring equipment or methods, including where appropriate biological monitoring methods, sample such effluents in accordance with such methods, at such locations, at such intervals, and in such a manner as the agency shall prescribe, and providing such other information as the agency may reasonably require;

(8) Notwithstanding any other provision of chapter 115, and with respect to the pollution of waters of the state, chapter 116, requiring the achievement of more stringent limitations than otherwise imposed by effluent limitations in order to meet any applicable water quality standard by establishing new effluent limitations, based upon section 115.01, subdivision (5), clause (b), including alternative effluent control strategies for any point source or group of point sources to insure the integrity of water quality classifications, whenever the agency determines that discharges of pollutants from such point source or sources, with the application of effluent limitations required to comply with any standard of best available technology, would interfere with the attainment or maintenance of the water quality classification in a specific portion of the waters of the state. Prior to establishment of any such effluent limitation, the agency shall hold a public hearing to determine the relationship of the economic and social costs of achieving such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained and to determine whether or not such effluent limitation can be implemented with available technology or other alternative

control strategies. If a person affected by such limitation demonstrates at such hearing that, whether or not such technology or other alternative control strategies are available, there is no reasonable relationship between the economic and social costs and the benefits to be obtained, such limitation shall not become effective and shall be adjusted as it applies to such person;

(9) Modifying, in its discretion, any requirement or limitation based upon best available technology with respect to any point source for which a permit application is filed after July 1, 1977 upon a showing by the owner or operator of such point source satisfactory to the agency that such modified requirements will represent the maximum use of technology within the economic capability of the owner or operator and will result in reasonable further progress toward the elimination of the discharge of pollutants.

(f) To require to be submitted and to approve plans and specifications for disposal systems or point sources, or any part thereof and to inspect the construction thereof for compliance with the approved plans and specifications thereof;

(g) To prescribe and alter rules and regulations, not inconsistent with law, for the conduct of the agency and other matters within the scope of the powers granted to and imposed upon it by this chapter and, with respect to pollution of waters of the state, in chapter 116, provided that every rule or regulation affecting any other department or agency of the state or any person other than a member or employee of the agency shall be filed with the secretary of state;

(h) To conduct such investigations, issue such notices, public and otherwise, and hold such hearings as are necessary or which it may deem advisable for the discharge of its duties

under this chapter and, with respect to the pollution of waters of the state, under chapter 116, including, but not limited to, the issuance of permits, and to authorize any member, employee, or agent appointed by it to conduct such investigations or, issue such notices and hold such hearings;

(i) For the purpose of water pollution control planning by the state and pursuant to the Federal Water Pollution Control Act, as amended, to establish and revise planning areas, adopt plans and programs and continuing planning processes, including, but not limited to, basin plans and areawide waste treatment management plans, and to provide for the implementation of any such plans by means of, including, but not limited to, standards, plan elements, procedures for revision, intergovernmental cooperation, residual treatment process waste controls, and needs inventory and ranking for construction of disposal systems;

(j) To train water pollution control personnel, and charge such fees therefor as are necessary to cover the agency's costs. All such fees received shall be paid into the state treasury and credited to the water pollution control training fund of the agency, from which the agency shall have the power to make disbursements to pay expenses relating to such training;

(k) To impose as additional conditions in permits to publicly owned disposal systems appropriate measures to insure compliance by industrial and other users with any pretreatment standard, including, but not limited to, those related to toxic pollutants, and any system of user charges ratably as is hereby required under state law or said Federal Water Pollution Control Act, as amended, or any regulations or guidelines promulgated thereunder; and

(l) To set a period not to exceed five years for the duration of any National Pollutant Discharge Elimination System permit.

Subd. 2. In any such hearing or investigation, any member of the agency, or any employee or agent thereto authorized by the agency, may administer oaths, examine witnesses and issue, in the name of the agency, subpoenas requiring the attendance and testimony of witnesses and the production of evidence relevant to any matter involved in any such hearing or investigation. Witnesses shall receive the same fees and mileage as in civil actions.

Subd. 3. In case of contumacy or refusal to obey a subpoena issued under this section, the district court of the county where the proceeding is pending or in which the person guilty of such contumacy or refusal to obey is found or resides, shall have jurisdiction upon application of the agency or its authorized member, employee or agent to issue to such person an order requiring him to appear and testify or produce evidence, as the case may require, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Subd. 4. It is unlawful for any person to issue or grant a building permit for, or otherwise permit, the construction, enlargement, or relocation of a commercial or industrial building to be used as the place of employment of more than 12 persons, or any other commercial or industrial building to house a process producing industrial or other wastes, unless the sewage or industrial or other waste originating in such buildings is or will be discharged into a disposal system for which a permit has first been granted by the agency unless the agency has cause not to apply this requirement, provided that this subdivision shall not apply to building permits issued for buildings, which have an estimated value of less than $500,000, located or to be located within an incorporated municipality.

After January 1, 1975 such permits shall be acted upon by the agency within 90 days after submitted, provided that the agency, for good cause, may order said 90 day period to be extended for a reasonable time.

Subd. 5. Notwithstanding any other provisions prescribed in or pursuant to chapter 115 and, with respect to the pollution of waters of the state, in chapter 116, or otherwise, the agency shall have the authority to perform any and all acts minimally necessary including, but not limited to, the establishment and application of standards, procedures, regulations, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the National Pollutant Discharge Elimination System (NPDES); provided that this provision shall not be construed as a limitation on any powers or duties otherwise residing with the agency pursuant to any provision of law.

APPENDIX G(3)

115.45 VIOLATIONS. Subdivision 1. It is the duty of every person affected to comply with the provisions of Laws 1963, Chapter 874, and of Minnesota Statutes, Sections 115.01 to 115.09, comprising the state water pollution control act, as now in force or hereafter amended, and all regulations, orders, and permits adopted or issued by the agency thereunder, and to do and perform all acts and things within his or its power required to effectuate, carry out, and accomplish the purposes of such provisions, regulations, orders, and permits.

APPENDIX G(4)
RULES AND REGULATIONS
CHAPTER FIFTEEN: WPC 15
CRITERIA FOR THE CLASSIFICATION OF THE INTERSTATE WATERS OF THE STATE AND THE ESTABLISHMENT OF STANDARDS OF QUALITY AND PURITY

WPC 15 The official policy and purpose of the State of Minnesota in regard to these matters is set forth in the Minnesota Water Pollution Control Statutes as amended by Minnesota Laws 1973, Chapter 374:

Sec. 115.42. It is the policy of the state to provide for the prevention, control and abatement of pollution of all waters of the state, so far as feasible and practical, in furtherance of conservation of such waters and protection of the public health and in furtherance of the development of the economic welfare of the state.

. . . It is the purpose of Laws 1963, Chapter 874, to safeguard the waters of the state from pollution by: (a) preventing any new pollution; and (b) abating pollution existing when Laws 1963, Chapter 874, become effective, under a program consistent with the declaration of policy above stated.

Sec. 115.44 Subd. 2. In order to attain the objectives of Laws 1963, Chapter 874, the Agency after proper study, and after conducting public hearing upon due notice, shall as soon as practicable, group the designated waters of the state into classes and adopt classifications and standards of purity and quality therefor. Such classification shall be made in accordance with considerations of best usage in the interest of the public and with regard to the considerations mentioned in subdivision 3 hereof.

Sec. 115.44 Subd. 8. If the Agency finds in order to comply with the federal water pollution control act or any other federal law or rule or regulation promulgated thereunder that it is impracticable to comply with the requirements of this section in classifying waters or adopting standards or in meeting any of the requirements thereof, compliance with the requirements of such section are waived to the extent necessary to enable the agency to comply with federal laws and rules and regulations promulgated thereunder. The agency may classify waters and adopt criteria and standards in such form and based upon such evidence as it may deem necessary and sufficient for the purposes of meeting requirements of such federal laws, notwithstanding any provisions in chapter 115 or any other state law to the contrary. In the event waters are classified and criteria and standards are adopted to meet the requirements of federal law, the agency shall thereafter proceed to otherwise comply with the provisions of this section which were waived as rapidly as is practicable. This authority shall extend to proceedings pending before the agency on May 20, 1973.

. . . Wherever advisable and practicable the agency may establish standards for effluent or disposal systems discharging into waters of the state regardless of whether such waters are or are not classified.

Sec. 115.03 Subd. 5. Notwithstanding any other provisions prescribed in or pursuant to chapter 115 and, with respect to the pollution of waters of the state, in chapter 116, or otherwise, the agency shall have the authority to perform any and all acts minimally necessary including, but not limited to, the establishment and application of standards, procedures, regulations, orders, variances, stipulation agreements, sched-

ules of compliance, and permit conditions, consistent with and, therefore, not less stringent than the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the National Pollutant Discharge Elimination System (NPDES). . . .

In accordance with this declaration of policy and legislative intent, and under the powers delegated to the Agency, the following interstate water use classifications and corresponding standards of quality and purity are hereby adopted by the Pollution Control Agency as provided by law.

(a) Introduction

(1) Scope. The following classifications, criteria and standards of water and effluent quality and purity as hereby adopted and established shall apply to all interstate waters of the state, notwithstanding any other interstate water quality or effluent regulations of general or specific application, except that any more stringent water quality or effluent standards or prohibitions in the other applicable regulations are preserved.

(2) Severability. All provisions of this regulation shall be severable and the invalidity of any lettered paragraph or any subparagraph or subdivision thereof shall not void any other lettered paragraph or subparagraph, subdivision or any part thereof.

(3) Definitions. The terms "waters of the state" for the purposes of this regulation shall be construed to mean interstate waters as herein below defined, and the terms "sewage," "industrial wastes," and "other wastes," as well as any other terms for which definitions are given in the Water Pollution Control Statutes, as used herein have the meanings ascribed to them in Minnesota Statutes, Sections 115.01 and 115.41,

with the exception that disposal systems or treatment works operated under permit of the Agency shall not be construed to be "waters of the state" as the term is used herein. Interstate waters are defined as all rivers, lakes, and other waters that flow across or form part of state boundaries. Other terms and abbreviations used herein which are not specifically defined in applicable federal or state law shall be construed in conformance with the context, and in relation to the applicable section of the statutes pertaining to the matter at hand, and current professional usage.

(4) Uses of the Interstate Waters. The classifications are listed separately in accordance with the need for interstate water quality protection, considerations of best use in the interest of the public and other considerations, as indicated in Minnesota Statutes, Section 115.44. The classifications should not be construed to be an order of priority, nor considered to be exclusive or prohibitory of other beneficial uses.

(5) Determination of Compliance. In making tests or analyses of the interstate waters of the state, sewage, industrial wastes or other wastes to determine compliance with the standards, samples shall be collected in such manner and place, and of such type, number and frequency as may be considered necessary by the Agency from the viewpoint of adequately reflecting the condition of the interstate waters, the composition of the effluents, and the effects of the pollutants upon the specified uses. Reasonable allowance will be made for dilution of the effluents which are in compliance with Section (c)(6), following discharge into waters of the State. The Agency by allowing dilution may consider the effect on all uses of the interstate waters into which the effluents are discharged. The extent of dilution allowed regarding any specific discharge

shall not violate the applicable water quality standards. The samples shall be preserved and analyzed in accordance with procedures given in the 1971 edition of Standard Methods for the Examination of Water and Waste-Water, by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation, and any revisions or amendments thereto. The Agency may accept or may develop other methods, procedures, guidelines or criteria for measuring, analyzing and collecting samples.

(6) Natural Interstate Water Quality. The interstate waters may, in a state of nature, have some characteristics or properties approaching or exceeding the limits specified in the water quality standards. The standards shall be construed as limiting the addition of pollutants of human activity to those of natural origin, where such be present, so that in total the specified limiting concentrations will not be exceeded in the interstate waters by reason of such controllable additions. Where the background level of the natural origin is reasonably definable and normally is higher than the specified standard the natural level may be used as the standard for controlling the addition of pollutants of human activity which are comparable in nature and significance with those of natural origin. The natural background level may be used instead of the specified water quality standard as a maximum limit of the addition of pollutants, in those instances where the natural level is lower than the specified standard and reasonable justification exists for preserving the quality to that found in a state of nature.

In the adoption of standards for individual interstate waters, the Agency will be guided by the standards set forth herein but may make reasonable modifications of the same

on the basis of evidence brought forth at a public hearing if it is shown to be desirable and in the public interest to do so in order to encourage the best use of the interstate waters or the lands bordering such interstate waters.

(7) Non-Degradation. Waters which are of quality better than the established standards shall be maintained at high quality unless a determination is made by the Agency that a change is justifiable as a result of necessary economic or social development and will not preclude appropriate beneficial present and future uses of the waters. Any project or development which would constitute a source of pollution to waters of the state shall be required to provide the best practicable control technology currently available not later than July 1, 1977 and the best available technology economically achievable not later than July 1, 1983 and any other applicable treatment standards as defined by and in accordance with the requirements of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., as amended, in order to maintain high water quality and keep water pollution at a minimum. In implementing this policy the Administrator of the U. S. Environmental Protection Agency will be provided with such information as he requires to discharge his responsibilities under the Federal Water Pollution Control Act, as amended.

(8) Variance from Standards. In any case where, upon application of the responsible person or persons, the Agency finds that by reason of exceptional circumstances the strict enforcement of any provision of these standards would cause undue hardship; that disposal of the sewage, industrial waste or other waste is necessary for the public health, safety or welfare; and that strict conformity with the standards would be unreasonable, impractical or not feasible under the circumstances; the Agency in its discretion may grant a variance

therefrom upon such conditions as it may prescribe for prevention, control or abatement of pollution in harmony with the general purposes of these classifications and standards and the intent of the applicable state and federal laws. The U.S. Environmental Protection Agency will be advised of any permits which may be issued under this clause together with information as to the need therefor.

(b) Water Use Classifications—All Interstate Waters of the State. Based on considerations of best usage in the interest of the public and in conformance with the requirements of the applicable statutes, the interstate waters of the state shall be grouped into one or more of the following classes:

(1) Domestic Consumption. (To include all interstate waters which are or may be used as a source of supply for drinking, culinary or food processing use or other domestic purposes, and for which quality control is or may be necessary to protect the public health, safety or welfare.)

(2) Fisheries and Recreation. (To include all interstate waters which are or may be used for fishing, fish culture, bathing or any other recreational purposes, and for which quality control is or may be necessary to protect aquatic or terrestrial life, or the public health, safety or welfare.)

(3) Industrial Consumption. (To include all interstate waters which are or may be used as a source of supply for industrial process or cooling water, or any other industrial or commercial purposes, and for which quality control is or may be necessary to protect the public health, safety or welfare.)

(4) Agriculture and Wildlife. (To include all interstate waters which are or may be used for any agriculture purposes, including stock watering and irrigation, or by waterfowl or other wildlife, and for which quality control is or may be necessary to protect terrestrial life or the public health, safety or welfare.)

(5) Navigation and Waste Disposal. (To include all interstate waters which are or may be used for any form of water transportation or navigation, disposal of sewage, industrial waste or other waste effluents, or fire prevention, and for which quality control is or may be necessary to protect the public health, safety or welfare.)

(6) Other Uses. (To include interstate waters which are or may serve the above listed uses or any other beneficial uses not listed herein, including without limitation any such uses in this or any other state, province, or nation of any interstate waters flowing through or originating in this state, and for which quality control is or may be necessary for the above declared purposes, or to conform with the requirements of the legally constituted state or national agencies having jurisdiction over such interstate waters, or any other considerations the Agency may deem proper.)

(c) General Standards Applicable to All Interstate Waters of the State

(1) No untreated sewage shall be discharged into any interstate waters of the state. No treated sewage, or industrial waste or other wastes containing viable pathogenic organisms, shall be discharged into interstate waters of the state without effective disinfection. Effective disinfection of any discharges, including combined flows of sewage and storm water, will be required where necessary to protect the specified uses of the interstate waters.

(2) No sewage, industrial waste or other wastes shall be discharged into any interstate waters of the state so as to cause any nuisance conditions, such as the presence of significant amounts of floating solids, scum, oil slicks, excessive suspended solids, material discoloration, obnoxious odors, gas ebullition, deleterious sludge deposits, undesirable slimes or fungus growths, or other offensive or harmful effects.

(3) Existing discharges of inadequately treated sewage, industrial waste or other wastes shall be abated, treated or controlled so as to comply with the applicable standards. Separation of sanitary sewage from natural run-off may be required where necessary to ensure continuous effective treatment of sewage.

(4) The highest levels of water quality, including, but not limited to, dissolved oxygen, which are attainable in the interstate waters by continuous operation at their maximum capability of all primary and secondary units of treatment works or their equivalent discharging effluents into the interstate waters shall be maintained in order to enhance conditions for the specified uses.

(5) Means for expediting mixing and dispersion of sewage, industrial waste, or other waste effluents in the receiving interstate waters are to be provided so far as practicable when deemed necessary by the Agency to maintain the quality of the receiving interstate waters in accordance with applicable standards. Mixing zones be established by the Agency on an individual basis, with primary consideration being given to the following guidelines: (a) mixing zones in rivers shall permit an acceptable passageway for the movement of fish; (b) the total mixing zone or zones at any transect of the stream should contain no more than 25% of the crossectional area and/or volume of flow of the stream, and should not extend over more than 50% of the width; (c) mixing zone characteristics shall not be lethal to aquatic organisms; (d) for contaminants other than heat, the 96 hour median tolerance limit for indigenous fish and fish food organisms should not be exceeded at any point in the mixing zone; (e) mixing zones should be as small as possible, and not intersect spawning or nursery areas, migratory routes, water

intakes, nor mouths of rivers; and (f) overlapping of mixing zones should be minimized and measures taken to prevent adverse synergistic effects.

(6) It is herein established that the Agency shall require secondary treatment as a minimum for all municipal sewage and biodegradable industrial or other wastes to meet the adopted water quality standards. A comparable high degree of treatment or its equivalent also shall be required of all non-biodegradable industrial or other wastes unless the discharger can demonstrate to the Agency that a lesser degree of treatment or control will provide for water quality enhancement commensurate with present and proposed future water uses and a variance is granted under the provisions of the variance clause. Secondary treatment facilities are defined as works which will provide effective sedimentation, biochemical oxidation, and disinfection, or the equivalent, including effluents conforming to the following:

Substance or Characteristic	*Limiting Concentration or Range**
5-Day Biochemical Oxygen demand	25 milligrams per liter
Fecal coliform group organisms	200 most probable number per 100 milliliters
Total suspended solids	30 milligrams per liter
Pathogenic organisms	None
Oil	Essentially free of visible oil
Phosphorus**	1 milligram per liter
Turbidity	25
pH range	6.5-8.5
Unspecified toxic or corrosive substances	None at levels acutely toxic to humans or other animals or plant life, or directly damaging to real property.

*The arithmetic mean for concentrations of 5-day biochemical oxygen demand and total suspended solids shall not exceed the stated values in a period of 30 consecutive days and 45 milligrams per liter in a period of 7 consecutive days. Disinfection of wastewater effluents to reduce the coliform organisms levels is required year around. The geometric mean for the fecal coliform organisms shall not exceed the stated value in a period of 30 consecutive days and 400 most probable number per 100 milliliters in a period of 7 consecutive days. The application of the coliform and pathogenic organism standards ordinarily shall be limited to sewage or other effluents containing admixtures of sewage and shall not apply to industrial wastes except where the presence of sewage, fecal coliform organisms or viable pathogenic organisms in such wastes is known or reasonably certain.

**Where the discharge of effluent is directly to or affects a lake or reservoir. Removal of nutrients from all wastes shall be provided to the fullest practicable extent wherever sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses.

In addition to providing secondary treatment as defined above, all dischargers of sewage, industrial wastes or other wastes also shall provide the best practicable control technology not later than July 1, 1977, and best available technology economically achievable by July 1, 1983, and any other applicable treatment standards as defined by and in accordance with the requirements and schedules of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., as amended, and applicable regulations or rules promulgated pursuant thereto by the Administrator of the U. S. Environmental Protection Agency.

(7) Dischargers of sewage, industrial waste or other waste effluents shall be controlled so that the water quality standards will be maintained at all stream flows which are equal to or exceeded by 90 percent of the seven consecutive daily average flows of record (the lowest weekly flow with a once in ten year recurrence interval) for the critical month(s). The period of record for determining the specific flow for the stated recurrence interval, where records are available, shall include at least the most recent ten years of record, including flow records obtained after establishment of flow regulation devices, if any. Such calculations shall not be applied to lakes and their embayments which have no comparable flow recurrence interval. Where stream flow records are not available, the flow may be estimated on the basis of available information on the watershed characteristics, precipitation, run-off and other relevant data.

Allowance shall not be made in the design of treatment works for low stream flow augmentation unless such flow augmentation of minimum flow is dependable and controlled under applicable laws or regulations.

(8) In any instance where it is evident that the minimal treatment specified in Section (c)(6) and dispersion are not effective in preventing pollution, or if at the applicable flows it is evident that the specified stream flow is inadequate to protect the specified water quality standards, the specific standards may be interpreted as effluent standards for control purposes. In addition, the following effluent standards may be applied without any allowance for dilution where stream flow or other factors are such as to prevent adequate dilution, or where it is otherwise necessary to protect the interstate waters for the stated uses:

*Item**	*Limits*
5 day biochemical oxygen demand	5 milligrams per liter
Total suspended solids	5 milligrams per liter

*The concentrations specified in section (c)(6) of this regulation may be used in lieu thereof if the discharge of effluent is restricted to the spring flush or other high runoff periods when the stream flow rate above the discharge point is sufficiently greater than the effluent flow rate to insure that the applicable water quality standards are met during such discharge period. If treatment works are designed and constructed to meet the specified limits given above for a continuous discharge, at the discretion of the Agency the operation of such works may allow for the effluent quality to vary between the limits specified above and in section (c)(6), provided the water quality standards and all other requirements of the Agency and the U.S. Environmental Protection Agency are being met. Such variability of operation must be based on adequate monitoring of the treatment works and the effluent and receiving waters as specified by the Agency.

(9) In any case where, after a public hearing, the Agency finds it necessary for conformance with Federal requirements, or conservation of the interstate waters of the state, or protection of the public health, or in furtherance of the development of the economic welfare of the state, it may prohibit or further

limit the discharge to any designated interstate waters of any sewage, industrial waste, or other waste effluents, or any component thereof, whether such effluents are treated or untreated, or existing or new, notwithstanding any other provisions of classifications or specific standards stated herein which may be applicable to such designated interstate waters.

(10) It shall be incumbent upon all persons responsible for existing or new sources of sewage, industrial wastes or other wastes which are or will be discharged to interstate waters, to treat or control their wastes so as to produce effluents having a common level or concentration of pollutants of comparable nature or effect as may be necessary to meet the specified standards or better, but this shall not be interpreted to prohibit the Agency after providing an opportunity for public hearing from accepting effective loss prevention and/or water conservation measures or process changes or other waste control measures or arrangements as being equivalent to the waste treatment measures required for compliance with applicable effluent and/or water quality standards or load allocations.

(11) All sources of sewage, industrial waste, or other waste which do not at present have a valid operation and discharge permit, or an application for the same pending before the Agency, shall apply for the same within 30 days of the adoption of this regulation, or the Agency may abate the source forthwith. The provisions of section (c)(6) relating to effluent quality standards, and the other provisions of this regulation, are applicable to existing sewage, industrial waste or other waste disposal facilities and the effluent discharged therefrom. Nothing herein shall be construed to prevent the Agency subsequently from modifying any existing permits so as to conform with federal requirements and the requirements of this regulation.

(12) Liquid substances which are not commonly considered to be sewage or industrial wastes but which could constitute a pollution hazard shall be stored in accordance with Regulation WPC 4, and any revisions or amendments thereto. Other wastes as defined by law or other substances which could constitute a pollution hazard shall not be deposited in any manner such that the same may be likely to gain entry into any interstate waters of the state in excess of or contrary to any of the standards herein adopted, or cause pollution as defined by law.

(13) No sewage, industrial waste or other wastes shall be discharged into the interstate waters of the state in such quantity or in such manner alone or in combination with other substances as to cause pollution thereof as defined by law. In any case where the interstate waters of the state into which sewage, industrial wastes or other waste effluents discharge are assigned different standards than the interstate waters into which such receiving interstate waters flow, the standards applicable to the interstate waters into which such sewage, industrial waste or other wastes discharged shall be supplemented by the following:

The quality of any waters of the state receiving sewage, industrial waste or other waste effluents shall be such that no violation of the standards of any interstate waters of the state in any other class shall occur by reason of the discharge of such sewage, industrial waste or other waste effluents.

(14) Questions concerning the permissible levels, or changes in the same, of a substance, or combination of substances, of undefined toxicity to fish or other biota shall be resolved in accordance with the latest methods recommended by the U. S. Environmental Protection Agency. The recommendations of the National Technical Advisory Committee appointed by the U. S. Environmental Protection Agency shall be used as official guidelines in all aspects where the recommendations may be applicable. Toxic substances shall not exceed 1/10 of the 96 hour median tolerance limit (TLM) as a water quality standard except that other more stringent application factors shall be used when justified on the basis of available evidence.

(15) All persons operating or responsible for sewage, industrial waste or other waste disposal systems which are adjacent to or which discharge effluents to these waters or to tributaries which affect the same, shall submit regularly every month a report to the agency on the operation of the disposal system, the effluent flow, and the characteristics of the effluents and receiving waters. Sufficient data on measurements, observations, sampling and analyses, and other pertinent information shall be furnished as may be required by the Agency to adequately evaluate the condition of the disposal system, the effluent, and the waters receiving or affected by the effluent.

(d) Specific Standards of Quality and Purity for Designated Classes of Interstate Waters of the State. The following standards shall prescribe the qualities or properties of the interstate waters of the state which are necessary for the designated public use or benefit and which, if the limiting conditions given are exceeded, shall be considered indicative of a polluted condition which is actually or potentially deleterious, harmful, detrimental or injurious with respect to such designated uses or established classes of the interstate waters:

(1) Domestic Consumption

Class A The quality of this class of the interstate waters of the state shall be such that without treatment of any kind the raw waters will meet in all respects both the mandatory and recommended requirements of the Public Health Service Drinking Water Standards—1962 for drinking water as specified in Publication No. 956 published by the Public Health Service of the U. S. Department of Health, Education and Welfare, and any revisions, amendments or supplements thereto. This standard will ordinarily be restricted to underground waters with a high degree of natural protection. The basic requirements are given below:

Substance or Characteristic	*Limit or Range*
Total coliform organisms	1 most probable number per 100 milliliters
Turbidity value	5
Color value	15
Threshold odor number	3
Methylene blue active substance (MBAS)	0.5 milligram per liter
Arsenic (As)	0.01 milligrams per liter
Chlorides (Cl)	250 milligrams per liter
Copper (Cu)	1 milligram per liter
Carbon Chloroform extract	0.2 milligram per liter
Cyanides (CN)	0.01 milligram per liter
Fluorides (F)	1.5 milligrams per liter
Iron (Fe)	0.3 milligrams per liter
Manganese (Mn)	0.05 milligrams per liter
Nitrates (NO^3)	45 milligrams per liter
Phenol	0.001 milligram per liter

Sulfates (SO^4)	250 milligrams per liter
Total dissolved solids	500 milligrams per liter
Zinc (Zn)	5 milligrams per liter
Barium (Ba)	1 milligram per liter
Cadmium (Cd)	0.01 milligram per liter
Chromium (Hexavalent, Cr)	0.05 milligram per liter
Lead (Pb)	0.05 milligram per liter
Selenium (Se)	0.01 milligram per liter
Silver (Ag)	0.05 milligram per liter
Radioactive material	Not to exceed the lowest concentrations permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.

Class B The quality of this class of the interstate waters of the state shall be such that with approved disinfection, such as simple chlorination or its equivalent, the treated water will meet in all respects both the mandatory and recommended requirements of the Public Health Service Drinking Water Standards—1962 for drinking water as specified in Publication No. 956 published by the Public Health Service of the U. S. Department of Health, Education and Welfare, and any revisions, amendments or supplements thereto. This standard will ordinarily be restricted to surface and underground waters with a moderately high degree of natural protection. The physical and chemical standards quoted above for Class A interstate waters shall also apply to these interstate waters in the untreated state, except as listed below:

Substance or Characteristic	*Limit or Range*
Fecal coliform organisms	10 most probable number per 100 milliliters

Class C The quality of this class of the interstate waters of the state shall be such that with treatment consisting of coagulation, sedimentation, filtration, storage and chlorination, or other equivalent treatment processes, the treated water will meet in all respects both the mandatory and recommended requirements of the Public Health Service Drinking Water Standards—1962 for drinking water as specified in Publication No. 956 published by the Public Health Service of the U. S. Department of Health, Education and Welfare, and any revisions, amendments or supplements thereto. This standard will ordinarily be restricted to surface waters, and ground waters in aquifers not considered to afford adequate protection against contamination from surface or other sources of pollution. Such aquifers normally would include fractured and channeled limestone, unprotected impervious hard rock where interstate water is obtained from mechanical fractures, joints, etc., with surface connections, and coarse gravels subjected to surface water infiltration. The physical and chemical standards quoted above for Class A interstate waters shall also apply to these interstate waters in the untreated state, except as listed below:

Substance or Characteristic	*Limit or Range*
Fecal Coliform organisms	200 most probable number per 100 milliliters
Turbidity value	25

Class D The quality of this class of the interstate waters of the state shall be such that after treatment consisting of coagulation, sedimentation, filtration, storage and chlorination, plus additional pre, post, or intermediate stages of treatment, or other equivalent treatment processes, the treated water will meet in all respects the recommended requirements of the Public Health Service Drinking Water Standards—1962 for drinking water as specified in Publication No. 956 published by the Public Health Service of the U. S. Department of Health, Education and Welfare, and any revisions, amendments or supplements thereto. This standard will ordinarily be restricted to surface waters, and ground waters in aquifers not considered to afford adequate protection against contamination from surface or other sources of pollution. Such aquifers normally would include fractured and channeled limestone, unprotected impervious hard rock where water is obtained from mechanical fractures, joints, etc., with surface connections, and coarse gravels subjected to surface water infiltration. The concentrations or ranges given below shall not be exceeded in the raw waters before treatment:

Substance or Characteristic	*Limit or Range*
Fecal coliform organisms	200 most probable number per 100 milliliters
Arsenic (As)	0.05 milligram per liter
Barium (Ba)	1 milligram per liter
Cadmium (Cd)	0.01 milligram per liter
Chromium (Cr+6)	0.05 milligram per liter
Cyanide (CN)	0.2 milligram per liter
Fluoride (F)	1.5 milligrams per liter

Lead (Pb)	0.05 milligram per liter
Selenium (Se)	0.01 milligram per liter
Silver (Ag)	0.05 milligram per liter
Radioactive material	Not to exceed the lowest concentrations permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.

In addition to the above listed standards, no sewage, industrial waste or other wastes, treated or untreated, shall be discharged into or permitted by any person to gain access to any interstate waters classified for domestic consumption so as to cause any material undesirable increase in the taste, hardness, temperature, toxicity, corrosiveness or nutrient content, or in any other manner to impair the natural quality or value of the interstate waters for use as a source of drinking water.

(2) Fisheries and Recreation

Class A The quality of this class of the interstate waters of the state shall be such as to permit the propagation and maintenance of warm or cold water sport or commercial fishes and be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable. Limiting concentrations or ranges of substances or characteristics which should not be exceeded in the interstate waters are given below:

Substance or Characteristic	*Limit or Range*
Dissolved oxygen	Not less than 7 milligrams per liter from October 1st and continuing through May 31st, and Not less than 6 milligrams per liter at other times.

Temperature	No material increase
Ammonia (N)	0.2 milligram per liter
Chlorides (Cl)	50 milligrams per liter
Chromium (Cr)	0.02 milligram per liter
Copper (Cu)	0.01 milligram per liter or not greater than 1/10 the 96 hour TLM value.
Cyanides (CN)	0.2 milligram per liter
Oil	0.5 milligram per liter
pH value	6.5 - 8.5
Phenols	0.01 milligram per liter and none that could impart odor or taste to fish flesh or other freshwater edible products such as crayfish, clams, prawns and like creatures. Where it seems probable that a discharge may result in tainting of edible aquatic products, bio-assays and taste panels will be required to determine whether tainting is likely or present.
Turbidity value	10
Color value	30
Fecal coliform organisms	200 most probable number per 100 milliliters as a monthly geometric mean based on not less than 5 samples per month, nor exceed 400 most probable number per 100 milliliters in more than 10% of all samples during any month.

Radioactive materials	Not to exceed the lowest concentrations permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.

Class B The quality of this class of the interstate waters of the state shall be such as to permit the propagation and maintenance of cool or warm water sport or commercial fishing and be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable. Limiting concentrations or ranges of substances or charateristics which should not be exceeded in the interstate waters are given below:

Substance or Characteristic	*Limit or Range*
Dissolved oxygen	Not less than 6 milligrams per liter from April 1 through May 31, and Not less than 5 milligrams per liter at other times.
Temperature*	5°F above natural in streams and 3°F above natural in lakes, based on monthly average of the maximum daily temperature, except in no case shall it exceed the daily average temperature of 86°F.
Ammonia (N)	1 milligram per liter
Chromium (Cr)	0.05 milligram per liter

Copper (Cu)	0.01 milligram per liter or not greater than 1/10 the 96 hour TLM value.
Cyanides (CN)	0.02 milligram per liter
Oil	0.5 milligram per liter
pH value	6.5 - 9.0
Phenols	0.01 milligram per liter and none that could impart odor or taste to fish flesh or other freshwater edible products such as crayfish, clams, prawns and like creatures. Where it seems probable that a discharge may result in tainting of edible aquatic products, bioassays and taste panels will be required to determine whether tainting is likely or present.
Turbidity value	25
Fecal coliform organisms	200 most probable number per 100 milliliters as a monthly geometric mean based on not less than 5 samples per month, nor equal or exceed 2000 most probable number per 100 milliliters in more than 10% of all samples during any month.

Radioactive materials	Not to exceed the lowest concentration permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.

*The following temperature criteria will be applicable for the Mississippi River from Lake Itasca to the outlet of the Metro Wastewater Treatment Works in St. Paul in addition to or superseding the above. The weekly average temperature shall not exceed the following temperatures during the specified months:

January	40°F	July	83°F
February	40°F	August	83°F
March	48°F	September	78°F
April	60°F	October	68°F
May	72°F	November	50°F
June	78°F	December	40°F

For the Mississippi River from Lock and Dam No. 2 at Hastings to the Iowa Border, the weekly average temperature shall not exceed the following temperatures during the specified months:

January	40°F	July	84°F
February	40°F	August	84°F
March	54°F	September	82°F
April	65°F	October	73°F
May	75°F	November	58°F
June	84°F	December	48°F

Class C The quality of this class of the interstate waters of the state shall be such as to permit the propagation and

maintenance of rough fish or species commonly inhabiting waters of the vicinity under natural conditions, and be suitable for boating and other forms of acquatic recreation for which the interstate waters may be usable. Limiting concentrations or ranges of substances or characteristics which should not be exceeded in the interstate waters are given below:

Substance or Characteristic	*Limit or Range*
Dissolved oxygen	Not less than 5 milligrams per liter from April 1 through November 30, and not less than 4 milligrams per liter at other times.
Temperature*	5°F above natural in streams and 3°F above natural in lakes, based on monthly average of the maximum daily temperature except in no case shall it exceed the daily average temperature of 90°F.
Ammonia (N)	1.5 milligrams per liter
Chromium (Cr)	0.05 milligram per liter
Copper (Cu)	0.01 milligram per liter or not greater than 1/10 the 96 hour TLM value.
Cyanides (CN)	0.02 milligram per liter
Oil	10 milligrams per liter, and none in such quantities as to (1) produce a visible color film on the surface, (2) impart an oil odor to water or an oil taste to fish and edible invertebrates, (3) coat the banks and bottom

	of the watercourse or taint any of the associated biota, or (4) become effective toxicants according to the criteria recommended.
pH value	6.5 - 9.0
Phenols	0.1 milligram per liter and none that could impart odor or taste to fish flesh or other freshwater edible products such as crayfish, clams, prawns and like creatures. Where it seems probable that a discharge may result in tainting of edible aquatic products, bioassays and taste panels will be required to determine whether tainting is likely or present.
Turbidity value	25
Fecal coliform organisms	200 most probable number per 100 milliliters as a geometric mean nor equal or exceed 2000 most probable number per 100 milliliters in more than 10% of the samples.
Radioactive materials	Not to exceed the lowest concentrations permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.

*The following temperature criteria will be applicable for the Mississippi River from the outlet of the Metro Wastewater Treatment Works in St. Paul to Lock and Dam No. 2 at Hastings in addition to or superseding the above. The weekly average temperature shall not exceed the following temperatures during the specified months.

January	40°F	July	83°F
February	40°F	August	83°F
March	48°F	September	78°F
April	60°F	October	68°F
May	72°F	November	50°F
June	78°F	December	40°F

For all classes of fisheries and recreation waters, the aquatic habitat, which includes the interstate waters and stream bed, shall not be degraded in any material manner, there shall be no material increase in undesirable slime growths or aquatic plants, including algae, nor shall there be any significant increase in harmful pesticide or other residues in the waters, sediments and aquatic flora and fauna; the normal fishery and lower aquatic biota upon which it is dependent and the use thereof shall not be seriously impaired or endangered, the species composition shall not be altered materially, and the propagation or migration of the fish and other biota normally present shall not be prevented or hindered by the discharge of any sewage, industrial waste or other waste effluents to the interstate waters.

No sewage, industrial waste or other wastes shall be discharged into any of the interstate waters of this category so as to cause any material change in any other substances or characteristics which may impair the quality of the interstate

waters or the aquatic biota of any of the above listed classes or in any manner render them unsuitable or objectionable for fishing, fish culture or recreational uses. Additional selective limits or changes in the discharge bases may be imposed on the basis of local needs.

(3) Industrial Consumption

Class A The quality of this class of the interstate waters of the state shall be such as to permit their use without chemical treatment, except softening for ground water, for most industrial purposes, except food processing and related uses, for which a high quality of water is required. The quality shall be generally comparable to Class B waters for domestic consumption, except for the following:

Substance or Characteristic	*Limit or Range*
Chlorides (Cl)	50 milligrams per liter
Hardness	50 milligrams per liter
pH value	6.5 - 8.5
Fecal coliform organisms	200 most probable number per 100 milliliters

Class B The quality of this class of the interstate waters of the state shall be such as to permit their use for general industrial purposes, except for food processing, with only a moderate degree of treatment. The quality shall be generally comparable to Class D interstate waters used for domestic consumption, except the following:

Substance or Characteristic	*Limit or Range*
Chlorides (Cl)	100 milligrams per liter
Hardness	250 milligrams per liter
pH value	6.0 - 9.0
Fecal coliform organisms	200 most probable number per 100 milliliters

Class C The quality of this class of the interstate waters of the state shall be such as to permit their use for industrial cooling and materials transport without a high degree of treatment being necessary to avoid severe fouling, corrosion, scaling, or other unsatisfactory conditions. The following shall not be exceeded in the interstate waters:

Substance or Characteristic	*Limit or Range*
Chlorides (Cl)	250 milligrams per liter
Hardness	500 milligrams per liter
pH value	6.0 - 9.0
Fecal coliform organisms	200 most probable number per 100 milliliters

Additional selective limits may be imposed for any specific interstate waters as needed.

In addition to the above listed standards, no sewage, industrial waste or other wastes, treated or untreated, shall be discharged into or permitted by any person to gain access to any interstate waters classified for industrial purposes so as to cause any material impairment of their use as a source of industrial water supply.

(4) Agriculture and Wildlife

Class A The quality of this class of the interstate water of the state shall be such as to permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area, including truck garden crops. The following concentrations or limits shall be used as a guide in determining the suitability of the

waters for such uses, together with the recommendations contained in Handbook 60 published by the Salinity Laboratory of the U. S. Department of Agriculture, and any revisions, amendments or supplements thereto:

Substance or Characteristic	*Limit or Range*
Bicarbonates (HCO^3)	5 milliequivalents per liter
Boron (B)	0.5 milligram per liter
pH value	6.0 - 8.5
Specific conductance	1,000 micromhos per centimeter
Total dissolved salts	700 milligrams per liter
Sodium (Na)	60% of total cations as milliequivalents per liter
Fecal coliform organisms	200 most probable number per 100 milliliters
Sulfates (SO^4)	10 milligrams per liter, applicable to water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels.
Radioactive materials	Not to exceed the lowest concentrations permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.

Class B The quality of this class of the interstate waters of the state shall be such as to permit their use by livestock and wildlife without inhibition or injurious effects. The limits or concentrations of substances or characteristics given below shall not be exceeded in the interstate waters:

Substance or Characteristic	*Limit or Range*
pH value	6.0 - 9.0
Total salinity	1,000 milligrams per liter
Fecal coliform organisms	200 most probable number per 100 milliliters
Radioactive materials	Not to exceed the lowest concentrations permitted to be discharged to an uncontrolled environment as prescribed by the appropriate authority having control over their use.
Unspecified toxic substances	None at levels harmful either directly or indirectly.

Additional selective limits may be imposed for any specific interstate waters as needed.

(5) Navigation and Waste Disposal. The quality of this class of the interstate waters of the state shall be such as to be suitable for esthetic enjoyment of scenery and to avoid any interference with navigation or damaging effects on property. The following limits or concentrations shall not be exceeded in the interstate waters:

Substance or Characteristic	*Limit or Range*
Fecal coliform organisms	200 most probable number per 100 milliliters
pH value	6.0 - 9.0
Hydrogen sulfide	0.02 milligrams per liter

Additional selective limits may be imposed for any specific interstate water as needed.

(6) Other Uses. The uses to be protected in this class may be under other jurisdictions and in other areas to which the interstate waters of the state are tributary, and may include any or all of the uses listed in the foregoing categories, plus any other possible beneficial uses. The Agency therefore reserves the right to impose any standards necessary for the protection of this class, consistent with legal limitations.

June 14, 1967; Amended July 1, 1969; Amended October 13, 1971; Amended October 4, 1973.

APPENDIX G(5)
CHAPTER TWENTY-FIVE: WPC 25
CLASSIFICATIONS OF INTERSTATE WATERS OF MINNESOTA

WPC 25: The following regulation establishing classifications applies to all interstate surface waters of the state.

(a) All interstate waters are included, although some minor watercourses such as unnamed streams or interconnecting waters and/or intermittently flowing creeks, ditches, or draws, etc., are not listed individually herein. All interstate waters are classified herein and this classification shall supersede the classification of the interstate waters listed in previously adopted Regulations WPC 1, 2, 3, 5, 6, 10, 11, 12, 13, 16 and 17.

(b) The regulation includes known present uses and/or uses which may be made of the waters in the future. In addition to the classification(s) given below, *all of the interstate waters whether or not specifically named herein are also included in Classes 2C, 3C, 4A and B, 5 and 6 for all reaches or areas where such uses are possible.* Where specific criteria are common to two or more listed classes the more restrictive value shall apply. For additional information refer to Regulation WPC 15, Criteria for *the Classification of the Interstate Waters of the State and the Establishment of Standards of Quality and Purity.*

(c) The provisions of this regulation shall be severable and the invalidity of any lettered paragraph or any subparagraph or subdivision thereof shall not make void any other lettered paragraph, subparagraph, subdivision or any other part thereof.

WATERS	REACH OR AREA INVOLVED OR LOCATION	CLASSIFICATION
Streams	*Red Cedar River Basin*	
Little Cedar River	Source to Iowa border	2C, 3B
Red Cedar River	Source to Austin	2B, 3B
Red Cedar River	Austin to Iowa border	2C, 3B
Deer Creek	Source to Iowa border	2C, 3B
Lime Creek	Source to Iowa border	2C, 3B
Otter Creek	Source to Iowa border	2B, 3B
Shell Rock River	Source to Iowa border	2B, 3B
Lakes		
Albert Lea Lake	(T. 102; R. 20, 21)	2B, 3B
Bear Lake	(T. 101; R. 22)	2B, 3B
Fountain Lake	(T. 102; R. 20, 21)	2B
State Line Lake	(T. 101; R. 22)	2B, 3B
Streams	*Des Moines River Basin*	
East Fork of the Des Moines River	Source to Iowa border	2B, 3B
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Soldier Creek	Source to Iowa border	2C, 3B

Lakes		
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Okamanpeedan Lake	(T. 101; R. 31)	2B, 3B
Lake Shetek	(T. 107, 108; R. 40, 41)	2B, 3B
Talcot Lake	(T. 105; R. 38, 39)	2B, 3B
Tuttle Lake	(T. 101; R. 31)	2B, 3B
Lake Yankton	(T. 109; R. 42)	2B, 3B
Streams	*Minnesota River Basin*	
Brush Creek	Iowa border to mouth	2C, 3B
Canby Creek	South Dakota border to mouth, except trout waters	2C, 3B
Canby Creek	(S. 8, 9, 17, 18, T. 114, R. 45; S. 13, 14, 22, 23, T. 114, R. 46)	2A, 3B
Blue Earth River	Iowa border to mouth	2B, 3B
East Fork of the Blue Earth River	Brush Creek to mouth	2C, 3B
West Fork of the Blue Earth River	Iowa border to mouth	2C, 3B
Florida Creek	South Dakota border to mouth	2C, 3B
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Lazarus Creek	South Dakota border to Canby Creek	2C, 3B
Minnesota River	Big Stone Lake outlet to Granite Falls	1C, 2B, 3B
Minnesota River	Granite Falls to Mankato	2B, 3B
Minnesota River	Mankato to Carver Rapids	2B, 3B
Minnesota River	Carver Rapids to mouth	2C, 3B
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North Fork of the Yellow Medicine River	South Dakota border to mouth	2C, 3B
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Salt Lake	(T. 117; R. 46)	2B, 3B
South Silver Lake	(T. 101; R. 30)	2B, 3B
Big Stone Lake	(T. 121, 122, 123, 124; R. 46, 47, 48, 49)	2B, 3B
Swan Lake	(T. 101; R. 30)	2B, 3B
Streams	*Lower Mississippi River Basin*	
Bear Creek	Source to Iowa border	2C, 3B
Beaver Creek	Source to Iowa border	2C, 3B
Crooked Creek	Source to mouth	1B, 2A, 3B
Upper Iowa River	Source to Iowa border and Iowa border to Iowa border	2B, 3B

Mississippi River	Outlet of Metro Wastewater Treatment Works in St. Paul to Lock and Dam No. 2 at Hastings	2C, 3B
Mississippi River	Lock and Dam No. 2 at Hastings to Iowa border	2B, 3B
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Riceford Creek	Source to mouth	2B, 3B
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Lakes		
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Mississippi River	Lake Itasca to Fort Ripley	2B, 3B
Mississippi River	Fort Ripley to the Upper Lock and Dam at St. Anthony Falls in Minneapolis	1C, 2B, 3B
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Medary Creek	Source to South Dakota border	2C, 3B
Mud Creek	Source to Iowa border	2C, 3B
Ocheyedan River	Ocheda Lake outlet to Iowa border	2B, 3B
Pipestone Creek	Source to South Dakota border	2C, 3B
Rock River	Source to Iowa border	2C, 3B
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In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL, WARREN SPANNAUS, AND ITS POLLUTION CONTROL AGENCY, APPELLANT

v.

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY, ET AL.

ON APPEAL FROM, AND ON PETITION FOR A WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM, AND BRIEF FOR THE RESPONDENTS IN OPPOSITION

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MOTION TO DISMISS OR AFFIRM, AND BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A-24 to A-45) is reported at 543 F. 2d 1198. The opinion of the district court (J.S. App. A-11 to A-23) is reported at 401 F. Supp. 524.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1976 (J.S. App. A-45 to A-46). A notice of appeal to this Court was filed on January 4, 1977 (J.S. App.

A-46 to A-47). On January 26, 1977, the State of Minnesota filed in this Court a jurisdictional statement. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2), or, alternatively, under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act Amendments of 1972 render the dredging operations of the United States Army Corps of Engineers, performed in navigable waters of the United States for the purpose of maintaining navigation, subject to state regulation.

STATEMENT

Appellant brought this action against the Secretary of the Army and certain subordinates in the United States Army Corps of Engineers asking the district court to declare that Section 313 of the Federal Water Pollution Control Act Amendments of 1972 (hereafter the FWPCA Amendments), 86 Stat. 875, 33 U.S.C. (Supp. V) 1323, required the Corps of Engineers in performing its dredging operations to comply with state water pollution control laws and regulations (J.S. App. A-10). Appellant alleged (J.S. App. A-6 to A-10) that discharges of "dredged spoil" from certain dredging operations of the Corps of Engineers[1] violated state effluent limitations[2] and state water quality standards.[3] Appellant

[1]In particular, the complaint referred to dredging in the Mississippi River and in Duluth Harbor (J.S. App. A-3). The Corps of Engineers is under a statutory duty to maintain a 9-foot channel for the Mississippi River (see 47 Stat. 55 and H.R. Doc. No. 290, 71st Cong., 2d Sess. (1930)) and a 28-foot channel for Duluth-Superior Harbor (see 74 Stat. 482 and H.R. Doc. No. 150, 86th Cong., 1st Sess. (1959)).

[2]See Minn. Reg. WPC 15(c)(3) and WPC 15(c)(6) (J.S. App. A-6 to A-7).

[3]See Minn. Reg. WPC 15(c)(13) and WPC 15(d) (J.S. App. A-8 to A-9).

also claimed that those discharges violated state law requiring disposal permits.

The Corps of Engineers denied appellant's jurisdiction over its dredging operations, and argued that Congress, in Section 404 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1344, specifically established a separate permit program for the disposal of dredged spoil to be administered by the Secretary of the Army, and thus continued the Corps' traditional immunity from state regulation in the performance of functions essential to the maintenance of navigation.

The district court (J.S. App. A-11 to A-23) held that Section 313 was an unqualified requirement that the Corps of Engineers comply with state water pollution control laws, including state permit requirements. The district court concluded that Section 404 was inapplicable when a State had a National Pollutant Discharge Elimination System (NPDES) program approved by EPA under Section 402(b) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1342(b), as did the State of Minnesota.

On appeal, the court of appeals reversed. The court rejected the district court's conclusion that the Corps is required to obtain state discharge permits, since that conclusion conflicted directly with this Court's decision in *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (J.S. App. A-27).[4] Appellant does not challenge that holding here (see J.S. 13). The court further held that the statutory scheme and the legislative history of the 1972 Amendments demonstrated that Congress did not intend to subject the

[4]The district court's decision was rendered before the decisions in the *Environmental Protection Agency* v. *California* case and in *Hancock* v. *Train*, 426 U.S. 167.

discharge of dredged spoil by the Corps of Engineers to state regulation, but intended that such discharges were to be regulated separately by the Secretary of the Army and the Administrator of the Environmental Protection Agency (J.S. App. A-28, A-44). The court rejected appellant's claim that its inability to regulate dredging by the Corps would have serious environmental consequences, since the Secretary's regulations, the Administrator's guidelines, and ongoing studies by the Corps are all designed "to assure that all discharges of dredged material result in the least environmental harm possible" (J.S. App. A-44). The court concluded (J.S. App. A-44 to A-45) that:

> the overriding concern of the Congress in this context was for the maintenance of unimpeded traffic in the navigable waters of the United States. Regulation by the various States of the Union, each with its own requirements, could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another. We find no authorization of such state regulation in the legislative history of the Act or its several sections. We hold that Congress did not intend a subordination of the federal power and authority in this area to State control.

ARGUMENT

The precise question presented here is whether the FWPCA Amendments subject to state regulation a specific activity—the discharge of dredged spoil—by a particular federal agency—the Corps of Engineers—in the course of a particular function—maintaining the navigable servitude of the United States. There is no conflict among the circuits on this question and the court of appeals correctly concluded that Congress, by separately vesting the regulation of that

particular activity in the Secretary of the Army and the Administrator of EPA, did not intend to subject that activity to the vagaries of state regulation. Further review of this issue is not warranted.

1. Pursuant to Rule 16(1)(a) of the Rules of this Court, appellees move to dismiss the appeal on the ground that it is not within the jurisdiction of the Court under 28 U.S.C. 1254(2), which provides for appeal only when a state statute has been held "invalid as repugnant to the Constitution, treaties or laws of the United States * * * ."[5] The principal issue in this case involves the interpretation of a federal statute, and appellant does not claim, nor did the court of appeals hold that any state statute was invalid as repugnant to the federal statute. By holding that the federal statute did not waive the traditional immunity of the Corps of Engineers from state regulation, the court implicitly held that the purported reach of state laws over the Corps' dredging activities was invalid under the Supremacy Clause; but claims of that nature are not within the scope of Section 1254(2). See *Swift & Co., Inc.* v. *Wickham*, 382 U.S. 111, where the Court held that federal preemption decisions, although grounded in the Supremacy Clause, did not give rise to three-judge court jurisdiction under 28 U.S.C 2281. See also *Hancock* v. *Train*, 426 U.S. 167, where claims similar to appellant's were reviewed by writ of certiorari.

Review of the judgment below therefore may properly be secured only by a writ of certiorari pursuant to 28 U.S.C.

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[5]If the Court should conclude that it has jurisdiction to entertain an appeal, we move in the alternative that the judgment below be summarily affirmed. See Rule 16(1) of the Rules of this Court.

1254(1). The Court should therefore treat the jurisdictional statement as a petition for a writ of certiorari. See 28 U.S.C. 2103; see also J.S. 3, n. 3.

2. The FWPCA Amendments do not render the dredging activities of the Corps of Engineers subject to state regulation.

As the court of appeals recognized (J.S. App. A-39), the inquiry whether a federal statute has waived the constitutional immunity of federal activities from state control and regulation must proceed from the basic premise, reaffirmed by this Court in *Hancock* v. *Train*, 426 U.S. 167, 179,[6] that:

> [b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate" that makes this authorization of state regulation "clear and unambiguous."

Those principles have particular force with respect to federal activities maintaining commercial navigation on interstate waterways, since the federal "power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government * * *." *Gibbons* v. *Odgen*, 9 Wheat. 1, 190.

In the FWPCA Amendments of 1972, Congress vested both the procedural and substantive regulation of dredging activities of the Corps of Engineers exclusively in the

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[6]Quoting from *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122; *Paul* v. *United States*, 371 U.S. 245, 263; *California ex rel. State Water Resources Control Board* v. *Environmental Protection Agency*, 511 F. 2d 963, 968 (C.A. 9), reversed on other grounds, 426 U.S. 200.

Secretary of the Army and the Administrator of EPA, not in the States.

Sections 401-405, 33 U.S.C. (Supp. V) 1341-1345, establish a permit system for the discharge of pollutants; discharges without a permit are prohibited. See Section 301(a), 33 U.S.C. (Supp. V) 1311(a). Under Section 402(a), the permit system is administered initially by the EPA Administrator on the basis of effluent limitations and standards of performance established by him. States participate in the permit program in two principal ways. First, Section 401 requires "[a]ny applicant for a Federal license or permit" to obtain a certificate from the State in which the discharge will originate that the discharge will comply with, *inter alia*, both state and federal effluent limitations, if any. Second, Section 402(b) allows States to administer their own permit programs if the Administrator approves their programs as adequate to insure compliance with certain standards and requirements. When a state program becomes operative, the federal permit program is suspended with respect to the waters subject to the state program. Section 402(c).

However, Section 404(a) provides:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits * * * for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

Section 402(a) makes clear that the Secretary of the Army has the exclusive authority to issue permits for the discharge of dredged spoil, since Section 402(a) begins "[e]xcept as provided in * * * Section 404 * * * the Administrator may * * * issue a permit * * * ." Section 404(b) directs the Secretary of the Army to specify disposal sites "through the

application of guidelines developed by the [EPA] Administrator, in conjunction with the Secretary of the Army * * * ." In addition, Section 404(c) authorizes the Administrator to veto a specified disposal site "whenever he determines * * * that the discharge * * * will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Before exercising his veto, however, the Administrator is required to consult with the Secretary of the Army.

In short, Section 404 not only vests permit issuing authority for dredged spoil disposal in the Secretary of the Army, it also establishes the substantive criteria on which that authority is to be exercised.

Appellant's claim rests primarily on the language of Section 313,[7] which appellant contends constitutes an unambiguous waiver of the Corps' immunity from state regulation (J.S. 11-14). That argument reads Section 313 in isolation from the remainder of the statute, which, when properly viewed in its entirety,[8] reflects Congress' intention that the dredging activities of the Corps of Engineers shall be subject exclusively to procedural and substantive regulation by the Secretary of the Army, acting in conjunction with the EPA Administrator.

Our position is supported by this Court's analysis of the statutory scheme in *Environmental Protection Agency* v.

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[7]Section 313, 33 U.S.C. (Supp. V) 1323, provides in part that "[e]ach department, agency, or instrumentality of * * * the Federal Government * * * shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements * * *."

[8]See *Kokoszka* v. *Belford*, 417 U.S. 642, 650; *Richards* v. *United States*, 369 U.S. 1, 11; *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 464-465.

California, supra. There the Court held that Section 313 does not impose upon any federal instrumentality, including the Corps of Engineers, state permit requirements. The Court recognized that under the statutory scheme, the EPA Administrator retains responsibility under Section 402(a) for ensuring federal compliance with substantive state requirements by issuing permits to federal instrumentalities which comply with state standards embodied in EPA-approved NPDES programs. 426 U.S. at 219-220. But with respect to the disposal of dredged spoil by the Corps of Engineers, Sections 402(a) and 404 make clear that the Administrator has no authority to issue permits. That authority is vested in the Secretary of the Army, who is specifically directed to exercise it by applying "guidelines developed by the Administrator, in conjunction with the Secretary of the Army"—and not by applying state requirements embodied in EPA-approved NPDES programs. Section 404(b).[9] In short, the statute is significantly devoid of any means by which state requirements may be imposed on the Corps of Engineers' dredging activities—in contrast to other activities of other federal instrumentalities. The substantive requirements that govern the issuing of permits for the disposal of dredged spoil by the Corps of Engineers are federally developed and federally administered requirements.[10]

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[9]Moreover to the extent that Section 404(c) authorizes the Administrator to exercise his veto over the designation of disposal sites, it directs him to consider specific criteria set forth in that section and to consult with the Secretary of the Army; it provides no role for state requirements embodied in state NPDES programs.

[10]In this respect, the statute distinguishes between the Corps of Engineers and private dredgers. Private dredgers must obtain a disposal permit from the Secretary of the Army, and as "applicant[s] for a Federal license or permit," are required by Section 401 to obtain a certificate from the State that the discharge will comply with statutory

Moreover, any uncertainty with respect to Congress' intent should be dispelled by the express language of Section 511(a), 33 U.S.C. (Supp. V) 1371(a), which states that "[t]his Act shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation * * *."

In summary, contrary to appellant's contention, the FWPCA Amendments do not constitute the kind of clear and unambiguous waiver of the Corps' immunity from state regulation which fundamental principles of federalism require; indeed they manifest precisely the opposite intent.

3. As the court of appeals correctly held, the legislative history of the FWPCA Amendments confirms that Congress did not intend to subject to state regulation the disposal of dredged spoil by the Corps of Engineers in the course of maintaining navigation on interstate waterways. Perhaps the clearest explication of the intent of Section 404 is reflected in the discussion of an amendment to the Senate version of the Amendments introduced by Senator Ellender. Senator Ellender's amendment was virtually identical to Section 404 as ultimately enacted (see J.S. App. A-32; 2 Leg. Hist. at 1386)[11]; as he explained the purpose of his amendment (2 Leg. Hist. at 1386-1387):

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requirements, including standards of performance established by the State. See Section 306(c), 33 U.S.C. (Supp. V) 1316(c). However, Section 401(a)(6) provides that "[n]o Federal agency shall be deemed to be an applicant for the purposes of this subsection."

[11]"Leg. Hist." refers to the two volumes of the legislative history of the 1972 FWPCA Amendments, entitled A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Committee Print, 1973), which the Library of Congress has compiled.

> One of the main deficiencies of [the reported] bill is that it treats dredged materials the same as industrial waste, sewage, sludge, or refuse introduced into a river system, lake, estuary or ocean. The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another. * * *
>
> * * * * *
>
> [Under the Ellender amendment] [t]he Secretary of the Army will not be obligated to require strict compliance with the effluent requirements established by the Environmental Protection Agency in issuing permits. The strict adherence to the published standards would result in 90 percent of the ports and harbors of the United States being closed, until such time as land disposal areas are provided. This would create a catastrophical situation with respect to our foreign and domestic commerce.

In opposing the amendment, Senator Muskie, described as "perhaps the Act's primary author",[12] said "What Senator Ellender's amendment would do would be to exempt dredging" (J.S. App. A-33; 2 Leg. Hist. at 1388).

Although the Senate did not adopt Senator Ellender's amendment, the version of Section 404 that emerged from the Conference Committee and that was ultimately enacted reflected the substance of the amendment, with the additional provisions that the Secretary of the

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[12]*E.I. duPont de Nemours & Co.* v. *Train*, No. 75-978, decided February 23, 1977, slip op. 16.

Army, in issuing permits, was to apply guidelines developed by the Administrator in conjunction with the Secretary, that the Secretary could consider "the economic impact * * * on navigation and anchorage" if the guidelines alone would prohibit the specification of a disposal site, and that the Administrator could veto site specifications. Moreover, as the court of appeals noted (J.S. App. A-34, A-37 to A-38), the House and Conference Committee reports both echoed Senator Ellender's concern that the FWPCA Amendments were not unreasonably to impair "dredging activities essential for the maintenance of interstate and foreign commerce."

4. The guidelines[13] promulgated pursuant to Section 404(b) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1344(b), by the EPA Administrator in conjunction with the Secretary of the Army, and the regulations[14] published by the Chief of Engineers implementing Section 404 demonstrate that the decision of the court of appeals does not free the Corps of Engineers from environmental constraints in conducting necessary dredging operations. The guidelines develop evaluation criteria[15] for *all* proposed discharges of dredged and fill material, and these criteria are expressly applicable to the Corps of Engineers.[16] Before the Corps of Engineers undertakes any dredging project, a "statement of findings" is prepared in which the guidelines and regulations are applied to its projects.[17] The Corps of Engineers is also conducting a

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[13]40 C.F.R. Part 230.

[14]33 C.F.R. Part 209.

[15]See 40 C.F.R. 230.4-230.5.

[16]40 C.F.R. 230.1(b)(2); see also 33 C.F.R. 209.145(e).

[17]33 C.F.R. 209.145(f)(vii).

comprehensive study of the environmental effects of the disposal of dredged material, which is known as the Dredged Material Research Program and which is authorized by Section 123(i) of the River and Harbor Act of 1970, 84 Stat. 1824, 33 U.S.C. 1165a(i). The knowledge gained from this program, as it becomes available, is being applied in implementing Section 404 to assure that all discharges of dredged and fill material, including those from the Corps' own projects, result in the least environmental harm possible.

CONCLUSION

For the reasons stated, the appeal should be dismissed and, treating the appeal as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General, WARREN SPANNAUS, and its Pollution Control Agency,

Appellants,

vs.

MARTIN R. HOFFMAN, as Secretary of the Army, et al.,

Appellees.

On Appeal From, and Petition for Certiorari to, the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE SIERRA CLUB AND THE IZAAK WALTON LEAGUE OF AMERICA, INC., IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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State of Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976) 4, 13

Statutory Authority:

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. §§1251 *et. seq.* (1976) 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15

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The Sierra Club and the Izaak Walton League of America, Inc., as *amici curiae* pursuant to Rule 42 of the rules of this Court, respectfully submit that the Appeal of the State of Minnesota in the instant appeal should be fully heard by the Court. The *amici curiae* submit that Appellants' reasons for requesting review show a need for consideration of the decision below by this honorable Court.

INTEREST OF THE *AMICI CURIAE*

The interest of the Sierra Club and the Izaak Walton League of America, Inc. in the federal agency jurisdictional question presented herein is twofold:

1. The Sierra Club, a national conservation organization, is a non-profit California corporation with its principal place of business in the City and County of San Francisco, California, and has a membership in excess of 150,000 members. The purposes of the Sierra Club are to enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy and preserve scenic resources of the United States and its forests, water, wildlife and wilderness; to undertake and to publish scientific, literary and educational studies concerning them; to educate the people with regard to the national and state navigable rivers and streams, forests, parks, monuments and other natural resources of a special scenic beauty and to enlist public interest and cooperation in protecting them.

The Izaak Walton League of America, Inc., (hereinafter referred to as the League) is a long-established citizen organization concerned with the environment and the preservation and use of natural resources. The League sponsors and actively involves itself in programs ranging from local conservation projects to programs involving the entire spectrum of environmental interests; from wilderness and wildlife to urban matters such as water quality, air quality, solid waste and rapid transit. The upper Mississippi River has been especially important to the League with its strong membership in Iowa, Illinois, Minnesota and Wisconsin. The League has been extensively involved in

considering the impact of a 9-foot navigation channel on the upper Mississippi. It has insisted that commerce on the river not devastate wildlife resources and recreational opportunities. The League is especially interested in the impact of dredge removal and disposal on river recreational and wildlife opportunities. Problems involved with the current methods of disposal include the suspension of toxic materials in the river, the choking off of a fresh water supply in backwater areas by disposal, and increased turbidity and its possible effects on aquatic vegetation and animal life.

2. The Sierra Club and the League are, in addition, vitally interested in assuring that water pollution control standards established by the United States and the respective states be enforced so as to provide the greatest degree of protection to United States water resourcs.

The impact of dredge removal and disposal on the ecology, recreation and wildlife as supported by United States water resources is of major concern to the Sierra Club and the League. Water is a finite resource. The quality of water affects the health, welfare and quality of life of each citizen of the United States and the quality of many of its industries. Because water quality affects United States citizens and industry, Congress in 1972 enacted Amendments to the Federal Water Pollution Control Act[1] to strengthen its efforts to meet the need for water quality, declaring as a national goal that "the discharge of pollutants into the navigable waters be *eliminated* by 1985."[2] The Amend-

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[1]The Act was first passed in 1948, Act of June 30, 1948, 62 Stat. 1155, and has been frequently amended. See annotation following 33 U.S.C. §1251 (Supp. IV). Before the 1972 Amendments, the Act was codified at 33 U.S.C. §§1151 *et. seq.*

[2]§101(a)(1), 33 U.S.C.A. §1251(a)(1) (1976) (emphasis added).

ments were aimed at achieving maximum limitations on effluents discharged into navigable waters as well as achieving acceptable water quality standards.[3] A National Pollution Discharge Elimination System was established as a means of achieving and enforcing the effluent limitations.[4] Congress also desired that "every federal agency provide national leadership in the control of water pollution in [its] operations."[5]

In the instant proceedings, the State of Minnesota seeks *inter alia* to require that the United States Army Corps of Engineers abide by Minnesota's water pollution control standards promulgated pursuant to the Federal Water Pollution Control Act, as amended.[6] The Eighth Circuit Court of Appeals, in a clear misreading of both the Act and this Court's recent decisions in *Hancock v. Train*[7] and *EPA v. California*,[8] has held that the Corps of Engineers need not follow Minnesota's substantive water pollution control standards.[9] As a result, the clear mandate of the Act has been ignored and the congressional goal that the discharge of pollutants into the navigable waters of the United States be eliminated by 1985 will not be attained to the serious detriment of all citizens of the United States.

It is perhaps unusual that an overriding federal objective is to be achieved by subjecting federal agencies in certain instances to state substantive laws. But in enacting the Federal Water Pollution Control Act Amendments of

[3] §102(a), 33 U.S.C.A. §1252(a) (1976).
[4] §402, 33 U.S.C.A. §1342 (1976).
[5] Senate Report quoted in *EPA v. California*, — U.S. —, 48 L.Ed.2d 578, 585 (1976).
[6] *State of Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976).
[7] — U.S. —, 96 S. Ct. 2006, 48 L.Ed.2d 555 (1976).
[8] — U.S. —, 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976).
[9] *State of Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976).

1972, Congress recognized that water quality conditions varied greatly from place to place, and that the rate and level of cleanup might therefore vary from state to state. Accordingly, Congress established certain minimum standards and authorized the states to promulgate stricter standards. At the same time, Congress directed that federal agencies be subject to these stricter state standards, unless expressly exempted by the President of the United States.

SUBSTANTIALITY OF THE ISSUE PRESENTED

A. The Dredging Activities of the United States Army Corps of Engineers Present a Real and Present Danger to the Citizens of the Several States.

The threat of pollution from the dredging activities of the Corps of Engineers will endanger the health and welfare of the citizens of the numerous states in which the dredging is conducted. The pollution has already seriously lowered the water quality in Minnesota and has adversely affected the natural environment of its rivers and lakes.

B. A Review by This Court at This Time Would Settle a Substantial Controversy and Prevent Repetitious Litigation.

The issue in the instant appeal will arise repeatedly because the Federal Water Pollution Control Act (FWPCA) Amendments allow the individual states to establish effluent limitations and water quality standards for navigable waters within their jurisdictions. It is possible that all fifty states may adopt limitations and standards and then seek compliance by federal agencies, including the Corps of Engineers. Briefs by *amici* in the instant case indicate the extent of the controversy.

C. The Issue of Whether Federal Agencies, Including the United States Army Corps of Engineers, Must Comply With State Substantive Limitations and Standards Under the Federal Water Pollution Control Act is One of First Impression Before This Court.

In *Hancock v. Train,* the EPA conceded that federal agencies must comply with state substantive requirements under the Clean Air Act: "The parties *rightly* agree that §118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules."[10] As shown above, the EPA made the same concession for state effluent limitations and water quality standards under the Federal Water Pollution Control Act in *EPA v. California.*[11] Thus, this Court has not decided the important issue presented in the instant appeal. Moreover, because the Eighth Circuit reached its decision without reopening briefing or oral argument after this Court's decisions in *Hancock v. Train* and *EPA v. California,* the application of those leading decisions to the issue presented in the instant appeal has never been argued before any federal court.

[10]96 S. Ct. at 2013, 48 L.Ed.2d at 566 (emphasis added).
[11]96 S. Ct. at 2027, 48 L.Ed.2d at 588.

D. Consideration of This Case by This Court at the Present Time Will Advance the Partnership Being Forged Between the State and Federal Governments in Restoring the Quality of Our Waters and Thereby Enhancing the Health and Well-being of Our Citizens.

Effective implementation of the congressional policy underlying the Amendments to the Federal Water Pollution Control Act would be enhanced if this Court at this time declared the validity of the federal and state partnership to restore the quality of our waters.

ARGUMENT

THE DREDGING OPERATIONS OF APPELLEE WITHIN MINNESOTA ARE SUBJECT TO MINNESOTA'S SUBSTANTIVE EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS, WHICH WERE PROMULGATED PURSUANT TO THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972.

A. Congress Clearly Expressed its Policy and Established the Regulatory Authority of the States With Regard to Effluent Limitations and Water Quality Standards in the Federal Water Pollution Control Act Amendments of 1972.

Congress significantly strengthened the Federal Water Pollution Control Act by the 1972 Amendments.[12] The congressional declaration of policy expressly set forth in the 1972 Amendments established the environmental concerns of Congress and its desire that individual states have

[12]§§101 *et. seq.,* 33 U.S.C.A. §§1251 *et. seq.* (1976).

the primary right and responsibility to eliminate water pollution:[13]

> (a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—(1) *it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;*
>
> * * *
>
> (b) *It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution* . . . .

Section 313 of the Amendments declares in clear and unambiguous language that federal departments and agencies engaged in any activity which may cause the discharge of pollutants shall comply with state requirements related to the control and abatement of pollution to the same extent as any private person:[14]

> *Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government* (1) having jurisdiction over any property or facility, or (2) *engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements,* including the payment of reasonable service fees. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . .

[13] §101(a) & (b), 33 U.S.C.A. §1251(a) & (b) (1976) (emphasis added).
[14] §313, 33 U.S.C.A. §1323 (1976) (emphasis added).

The term "pollutant," used within Section 313, is defined by the Amendments to include "dredged spoil," and other waste items.[15] This Court has held that the phrase "State requirements" of Section 313 does not include the optional permit programs authorized under the National Pollutant Discharge Elimination System (NPDES).[16] The Sierra Club and the League do not contest that portion of the Eighth Circuit's opinion dealing with permit programs. However, Congress meant by Section 313 that state substantive effluent limitations and other water quality standards shall govern federal activities and also the activities of private persons. The contrary holding by the Eighth Circuit in the instant case would render Section 313 meaningless. The Sierra Club and the League as *amici curiae* to this Court, submit that Congress meant what it said. Moreover, in *EPA v. California* this Court has already decided that state substantive requirements are binding upon all federal activities.

B. The Decision of the Eighth Circuit in *Minnesota v. Hoffman* Flies in the Face of This Court's Decision in *EPA v. California*.

In *EPA v. California,* this Court construed a portion of the Federal Water Pollution Control Act Amendments of 1972 and decided whether federal installations discharg-

[15] §502(6), 33 U.S.C.A. §1362(6) (1976).
[16] *EPA v. California,* 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976).

ing water pollutants within a state must secure permits from that state or from the Environmental Protection Agency. A similar issue concerning the related Clean Air Act was decided at the same time in *Hancock v. Train.*[17] The Supreme Court held in both cases that a state permit system was not one of the "requirements" with which federal installations must comply.

Mr. Justice White, writing for the Court, analyzed the 1972 Amendments and explained that two major changes had been effected. First, the Amendments established maximum effluent limitations and acceptable water quality standards. Second, the Amendments created the National Pollutant Discharge Elimination System which established a permit system to be administered either by EPA or by the states. This Court held that Section 313—which requires all federal departments, agencies, and instrumentalities to comply with state requirements respecting control and abatement of pollution—did not comprehend the NPDES state permit programs.

In reaching his conclusion in *EPA v. California,* Mr. Justice White explained that Section 313 does not obligate federal departments and agencies to comply with state procedural requirements, as opposed to state substantive requirements. In fact, the EPA through Justice Department attorneys conceded that federal departments and agencies were bound by the state substantive requirements:[18]

[17]96 S. Ct. 2006, 48 L.Ed.2d 555 (1976).

[18]96 S. Ct. at 2027, 48 L.Ed.2d at 588 (emphasis added). Defendants' brief to the Eighth Circuit in the instant case also conceded that, at a minimum, federal agencies must comply with state effluent limitations and water quality standards: "[W]hether, as a general rule, Section 313 requires federal agencies to comply with State laws requiring discharge permits or only State effluent limitations and water quality standards is now before the United States Supreme Court in *EPA, et al v. People of California, ex rel. State Water Resources Board, et al, ... The argument of EPA in that case . . . is hereby adopted and incorporated herein.* Brief for the Appellants, at 21 (January 1976) (emphasis added). May the government now in good faith contest that all federal agencies and departments are in fact required to comply with state effluent limitations and water quality standards?

> *EPA's position is that the Amendments made clear "only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its EPA—approved implementation plan,"* as incorporated in EPA—issued permits not that they comply with "state regulations demanding that sources of discharges—including federal facilities—obtain discharge permits."

Mr. Justice White quoted favorably from the Ninth Circuit's examination of legislative history of the 1972 Amendments to conclude that:[19]

> "[C]ertain parts of the legislative history would seem to indicate that the 'requirements' language of Section 303 refers simply and solely to substantive" standards, to effluent limitations and standards and schedules of compliance.

He noted that Section 510 of the Amendments permitted the states to set more restrictive standards, limitations, and requirements than those imposed upon the Amendments. The presence of stronger standards, reasoned Mr. Justice White, did not mean that state permits must be obtained by federal agencies, but did mean that federal permits must be utilized to enforce the *state* standards:[20]

[19]96 S. Ct. at 2029, 48 L.Ed.2d at 589.

[20]96 S. Ct. at 2031-32, 48 L.Ed.2d at 590-92 (emphasis added).

Section 510 quite plainly was intended to strengthen state authority. It may also have been intended to permit the States to impose stricter standards and effluent limitations on federal installations than would have been imposed under an EPA permit in the absence of an approved state NPDES program. But this hardly answers the question before us, which is whether these higher standards are to be enforced through a State rather than an EPA permit system.

* * *

We must also assume that Congress contemplated that there may be some States, which would elect not to develop an NPDES program but would nonetheless determine—as §510 permits—to adopt water quality standards or other limitations stricter than those EPA itself had promulgated and would otherwise apply. This being the case, Congress must have contemplated that EPA was capable of issuing permits in that State—to both federal and non-federal discharges—and of enforcing those stricter standards. . . .

> The presence of EPA as a permit-issuing authority means that although federal dischargers are not securing state NPDES permits they are nevertheless being subjected to the administrative authority of a federal agency *which is required to make a State's "more stringent limitation[s], including those necessary to meet water quality standards, treatment standards, or schedules of compliance" part of the conditions of the permits it must issue.*

In short, this Court held in *EPA v. California,* and the United States conceded, that State effluent limitations and water quality standards shall be enforced through federal permits for federal agencies and departments.

The contrary conclusion of the Eighth Circuit in *Minnesota v. Hoffman* that "there is insufficient evidence to meet the clear and unequivocable standard for finding Congressional authorization for state regulation . . ., whether by authorization under the NPDES *or independently thereof,*"[21] is contrary to both the express language of Section 313 and this Court's decision in *EPA v. California.*

C. The Decision of the United States Court of Appeals for the Eighth Circuit That Appellees Are Totally Immune From State Substantive Requirements Is Contrary to the Federal Water Control Pollution Act Amendments of 1972 and *EPA v. California.*

The instant case was submitted for decision before the Eighth Circuit on May 12, 1976. Approximately one month later this Court issued its two important decisions in *EPA v California* and *Hancock v. Train.* Unfortunately, despite the important contributions of this Court's guidance in those two cases, the Eighth Circuit did not reopen the instant case for additional briefings or arguments. Instead, on October 28, 1976, the Eighth Circuit decided both the procedural (permit) and substantive (effluent limitations and water quality standards) requirements questions adversely to the State of Minnesota. The Sierra Club and the League submit that the Eighth Circuit would have been assisted in its interpretation of *EPA v. California* if the instant case had been reopened for additional briefing.

For example the Eighth Circuit chose to rely upon Section 404 of the amendments,[22] which concerns only a per-

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[21] 543 F.2d 1198, 1209 (8th Cir. 1976).
[22] §404, 33 U.S.C.A. §1344 (1976).

mit program for the Corps of Engineers and not substantive standards, to support its conclusion that the Corps is not required to follow state effluent limitations and water quality standards. Section 404, while allowing the Corps of Engineers to assist in promulgating standards with regard to proposed discharges of dredged or filled material, was not enacted to enable the Corps to become a fiefdom unto itself. The Corps' standards promulgated pursuant to Section 404 must be reviewed by the administrator of the Environmental Protective Agency to determine that they are in accordance with EPA environmental standards.[23] The EPA, in turn, must take into consideration state effluent limitations and water quality standards in its review of the Corps' proposed standards.[24] Adequate briefing of that issue after *EPA v. California* would have shown the Eighth Circuit the important distinction between substantive and procedural standards.

[23] §404(b), 33 U.S.C.A. §1344(b) (1976).
[24] *Id.*

CONCLUSION

The Eighth Circuit Court of Appeals has erroneously construed the 1972 Amendments to the Federal Water Pollution Control Act and has failed to apply the law set forth in *EPA v. California*. The resulting decision in *Minnesota v. Hoffman* is of immense concern to environmental groups such as the Sierra Club and the Izaak Walton League. We respectfully request that this Court hear the appeal of the State of Minnesota and reverse the court below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General WARREN SPANNAUS, and its POLLUTION CONTROL AGENCY,

Appellant,

vs.

MARTIN R. HOFFMAN, Secretary, DEPARTMENT OF THE ARMY, et al.,

Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Amicus Curiae Brief of the States of California, Hawaii, Idaho and Washington

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In the Supreme Court of the United States

October Term, 1976

No. 76-1030

State of Minnesota, by its Attorney General Warren Spannaus, and its Pollution Control Agency,

Appellant,

vs.

Martin R. Hoffman, Secretary, Department of the Army, et al.,

Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Amicus Curiae Brief of the States of California, Hawaii, Idaho and Washington

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1254(2) the State of Minnesota, acting by and through its Attorney General, has appealed to this Honorable Court from a judgment of the United States Court of Appeals for the Eighth Circuit. This amicus curiae brief is respectfully submitted by the State of California, pursuant to Rule 42 (4), joined in by the States of Hawaii, Idaho and Washington.

INTEREST OF THE AMICI STATES

The decision of the Court of Appeals, *State of Minnesota v. Hoffman,* 543 F. 2d 1198 (1976), held that the United States Army Corps of Engineers was not required to meet state water pollution standards in its conduct of dredging operations in navigable waters within Minnesota. As the Court of Appeals properly recognized, the case is one of first impression; as such, its precedential impact will extend far beyond the immediate impact on Minnesota's water quality.

California, for example, faces on the waters of the Pacific Ocean for more than 1,000 miles. Its bays, harbors and wetlands are often the subject of Corps of Engineers dredging activities. In the San Francisco Bay system alone, the Corps operates for a substantial part of each year. Thus, the impact of the Court of Appeals' decision may have a significant impact on California's attempt to maintain adequate water quality in all areas of the State.

The States of Washington and Hawaii also have jurisdiction over extensive water areas in which the Corps of Engineers operates; each state will accordingly be affected substantially by a final conclusion that dredging by the Corps is not subject to state water quality standards. Finally, the State of Idaho is affected by several projects undertaken by the Corps, and thus has a similar interest in the question raised here.

Each of the amici states, as we shall note below, believes that the Eighth Circuit decision misconceives the congressional intent underlying the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U. S. C. §§ 1251 et seq. (Supp. IV). In light of the guidance provided by this Court in *Environmental Protection Agency*

v. California ex rel. State Water Resources Control Board, 426 U. S. 200 (1976), it should be concluded that the congressional requirement of Corps' compliance with state substantive water quality standards is sufficiently "clear and unambiguous" to sustain, in part, the judgment of the District Court.* The Court should accordingly note probable jurisdiction, and the judgment of the Court of Appeals should be reversed.

I. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 REQUIRE COMPLIANCE BY ALL FEDERAL AGENCIES WITH STATE SUBSTANTIVE WATER QUALITY STANDARDS UNLESS EXEMPTED BY PRESIDENTIAL ORDER.

I.

As pertinent here, section 313 of the Act, 33 U. S. C. § 1323 (Supp. IV), specifies:

> "Each department, agency or instrumentality of the executive, legislative and judicial branches of the federal government . . . shall comply with federal, state, interstate, and local requirements respecting control and abatement of pollution. . . ."

This waiver of federal immunity from the burdens imposed by state regulation could hardly be clearer. Undoubtedly for that reason, the federal government has conceded that federal agencies, departments and instrumentalities "must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pur-

*In light of *Environmental Protection Agency v. California ex rel. State Water Resources Control Board, supra,* we do not disagree with the Court of Appeals' conclusion that the Corps is not subject to either Minnesota's permit requirement established under the NPDES permit system of the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1342 (Supp. IV), or its permit requirement established under independent state law.

suant to its E. P. A.-approved implementation plan." Brief for the Petitioner, p. 18, in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board, supra,* 426 U. S. 200 (1976). The federal government has also similarly conceded that "it must meet all substantive water pollution standards set by the state." Petition for Certiorari, p. 6, in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board, supra.* Based in part on these representations, the Court has concluded that " 'the "requirements" language of Section 313 refers simply and solely to substantive' standards, to effluent limitations and standards and schedules of compliance." *Id.* at p. 215.

Without reference to any other provision of the Act, section 313 would accordingly require compliance by the Corps of Engineers with the pertinent Minnesota water quality standards; in the words of the District Court, section 313 is "an unqualified order to comply." *Minnesota v. Callaway,* 401 F. Supp. 524, 530 (D. Minn. 1975). The Court of Appeals nonetheless reached a contrary conclusion based on the existence of section 404 of the Act, 33 U. S. C. § 1344, which creates a separate permit program administered by the Corps of Engineers for dredging and filling in the nation's waters. In significant part, the Court of Appeals relied upon various congressional history indicating that the Corps plays an important role in maintaining the waterways of the nation open to water-borne traffic.

Section 404, however, contains no indication whatsoever of congressional intent on the question of Corps of Engineers compliance with state water quality standards: the section does no more than establish a permit program separate from the National Pollutant Discharge Elimination

System permit program administered by the Environmental Protection Agency under section 402, 33 U. S. C. § 1342 (Supp. IV).

The significance of the role of the Corps of Engineers in maintaining the waterways of the nation likewise does not answer the question raised. No doubt other federal agencies can cogently argue the significance of their congressionally authorized role in furthering commerce among the states; their obligation with respect to compliance with state water quality standards is, however, explicitly declared by section 313. It cannot be assumed that Congress intended to exempt a single federal agency from such a sweeping declaration, especially when the evidence relied upon does not even speak to the precise question.

The Court of Appeals found an "overriding concern" of Congress "for the maintenance of unimpeded traffic in the navigable waters of the United States" and concluded that the application of varying state laws "could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another." 543 F. 2d at p. 1209. The concern is illusory, since the question is not the applicability of state laws to traffic moving between the states; in such a situation, Congress acted to provide an *explicit* exemption from the broad power of the states to regulate. 33 U. S. C. § 1322 (f). The question here is the applicability of state laws to dredging and disposal activities performed wholly within the boundaries of the state. The pertinent Minnesota water quality standards were adopted by the state under section 303 of the Act, 33 U. S. C. § 1313, were subsequently approved by the Environmental Protection Agency, and, as such, form a

significant part of the state water quality regulatory scheme explicitly envisioned and authorized by Congress.

The concern expressed by the Court of Appeals, moreover, was directly addressed by Congress in its adoption of section 313. Congress, aware of the danger of impairing federal functions of national interest, did not avoid the problem by completely preventing the states from exercising control over federal activities, but directly answered it by building a safeguard into the Act which could limit the extent of such control. Section 313 authorizes the President to exempt any effluent source of a federal agency from state, local or federal standards, if such an exemption would be in the "paramount interest" of the United States. This provision thus provides a specific means to allay any fear that a state may unduly impair the performance of a vital federal function.

CONCLUSION

The federal government has conceded, and this Court has properly concluded, that federal agencies must comply with substantive state water quality standards. There is no basis for the conclusion that the Corps of Engineers, simply because it operates under an independent permit system, is exempt from the obligation imposed on all other federal agencies. The concerns expressed by the Court of Appeals relating to the need for proper maintenance of the nation's waterways were specifically addressed by Congress in section 313 of the 1972 Federal Water Pollution Control Act Amendments; Congress did not provide for a complete exemption for the Corps of Engineers, but provided for a Presidential exemption only in cases where such an exemption would be in the "paramount interest" of the United States.

The states of California, Hawaii, Idaho and Washington accordingly join with Minnesota in urging that the Court note probable jurisdiction, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Appellant,

v.

MARTIN R. HOFFMAN, Secretary, Department of the Army; CORPS OF ENGINEERS, Department of the Army; LT. GEN. WILLIAM C. GRIBBLE, Chief of Engineers, Department of the Army; and COLONEL MAX NOAH, District Engineer, Corps of Engineers,
Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATES OF WISCONSIN AND MISSOURI AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA'S JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES
October Term, 1976

STATE OF MINNESOTA, by its
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and its Pollution Control Agency,

Appellant,

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MARTIN R. HOFFMAN, Secretary,
Department of the Army;
CORPS OF ENGINEERS,
Department of the Army;
LT. GEN. WILLIAM C. GRIBBLE,
Chief of Engineers,
Department of the Army;
and COLONEL MAX NOAH,
District Engineer, Corps of Engineers,

Appellees.

BRIEF OF THE STATES OF WISCONSIN AND MISSOURI AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA'S JURISDICTIONAL STATEMENT

INTEREST OF THE AMICUS CURIAE

It is in the interest of the Amici Curiae, States of Wisconsin and Missouri, to seek a final determination of whether or not the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA)[1/] make the United States

[1/] 86 Stat. 816, *et seq.*, 33 U.S.C. sec. 1251, *et seq.*, (Supp. IV, 1975).

Corps of Engineers subject to the substantive requirements imposed by these states' effluent limitations and water quality standards. The resolution of this question is critical to both Wisconsin and Missouri since the Corps dredges and dumps millions of tons of bottom sediments within the states' boundaries in the Mississippi River, the Missouri River, and Lake Superior each year.

The State of Wisconsin is also awaiting a decision, on cross motions for summary judgment, from the Federal District Court for the Western District of Wisconsin regarding these very issues. Consequently, duplicitious litigation will likely be avoided if this Court undertakes review of the Eighth Circuit's decision.

ARGUMENT

The FWPCAA Requires The Corps Of Engineers To Comply With The Substantive Requirements Of State Effluent Limitations And Water Quality Standards.

The Eighth Circuit Court of Appeals has issued a sweeping pronouncement that the Corps is exempt from the effluent limitations and water quality standards established by the states.[2/] The Eighth Circuit's decision has dealt a serious blow to the clear thrust and scheme of the FWPCAA. Section 101 of the Act, 33 U.S.C. sec. 1251 (Supp. IV, 1975), reads in pertinent part as follows:

> "(b) *It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,* to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. . . ." (Emphasis supplied.)

Of greater significance is the language of Section 313 of the Act, 33 U.S.C. sec. 1323 (Supp. IV, 1975):

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the *Federal Government* (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge

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[2/] 543 F. 2d 1198 (CA 8 1976).

or runoff of pollutants *shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution* to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. . . ." (Emphasis supplied.)

And, buttressing Section 313 is Section 510 of the Act, 33 U.S.C. sec. 1370 (Supp. IV, 1975) which reads:

"*Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants,* or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) *be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.*" (Emphasis supplied.)

Noteworthy is the fact that the states' water quality standards have been approved by the Administrator of the Environmental Protection Agency (EPA) pursuant to sec. 303 of the Act, 33 U.S.C. sec. 1313 (Supp. IV, 1975). Such is the case with Minnesota's water quality standards. What an anomaly should the Corps be exempt from the substantive requirements of these standards when they have been effectively mandated by the federal government pursuant to sec. 303.

We are not unmindful of this Court's recent decision in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), wherein it was held that federal installations are not subject to the permit requirements of Section 402(b), 33 U.S.C. sec. 1369(b) (Supp. IV, 1975). But in that case, the Environmental Protection Agency argued, and this Court agreed, that Section 313 of the Act makes it clear "that the amendments make clear 'only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its EPA-approved implementation plan . . . .'" *EPA v. California ex rel. State Water Resources Control Board, supra,* at page 213. The Eighth Circuit has simply misinterpreted Section 313 of the Act in this regard and in so doing has grievously undermined one of the Act's specific intendments.

Moreover, the Eighth Circuit has failed to recognize that the Corps' own regulations provide for federal agency compliance with state substantive requirements. For example, 33 C.F.R. sec. 209.120(4)(ii)(1975), recognizes these requirements by stating:

". . . Federal agencies are required to comply with the substantive State, inter-

> state, and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provision of the Federal Water Pollution Control Act . . . ."

Also, 33 C.F.R. sec. 209.145(b)(1)(1975), cites Section 313 as an applicable law in connection with the Corps' disposal of dredged material in navigable waters. It is certainly puzzling that the Eighth Circuit failed to discuss these references in its opinion when it specifically relied upon 33 C.F.R. sec. 209.145(b)(1)(1975) for the proposition that the Corps recognizes EPA supervision in connection with dredge spoil disposal sites.

CONCLUSION

The Corps of Engineers dredges rivers and lakes all over the United States involving millions upon millions of tons of spoil material that directly affects the integrity of this nation's waters. The issues as presented by the Eighth Circuit's decision are therefore deserving of review by this court.

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